TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903

No. 109.

L. L. McCANDLESS, PLAINTIFF IN ERROR,

vs.

GEORGE R. CARTER, GOVERNOR OF THE TERRITORY OF HAWAII, AND JAMES W. PRATT, COMMISSIONER OF PUBLIC LANDS OF THE TERRITORY OF HAWAII.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED JUNE 25, 1903.

(20,764.)

(20,764.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 361.

L. L. McCANDLESS, PLAINTIFF IN ERROR,

vs.

GEORGE R. CARTER, GOVERNOR OF THE TERRITORY OF HAWAII, AND JAMES W. PRATT, COMMISSIONER OF PUBLIC LANDS OF THE TERRITORY OF HAWAII.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1907.

a In the Supreme Court of the United States of America.

L. L. McCandless, Plaintiff in Error,

vs.

George R. Carter, Governor of the Territory of Hawaii, and James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, Defendants in Error.

Writ of Error.

United States of America, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii before you, or some of you, being the highest court of law or equity of the said Territory of Hawaii in which a decision could be had in the said suit between L. L. McCandless, complainant and plaintiff in error, and George R. Carter, Governor of the Territory of Hawaii, and James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, respondents and defendants in error, wherein was drawn in question the validity of
b a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said Territory of Hawaii, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said L. L. McCandless, complainant and plaintiff in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of June, in the Year of Our Lord One Thousand Nine Hundred and Seven.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

c Allowed by
W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

d In the Supreme Court of the United States of America.

L. L. McCANDLESS, Plaintiff in Error,
vs.
GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii, Defendants in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To George R. Carter, Governor of the Territory of Hawaii, and James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, wherein L. L. McCandless is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiff-in-error as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Walter F. Frear, Chief Justice of
e the Supreme Court of the Territory of Hawaii, this 6th day of June, in the Year of Our Lord One Thousand Nine Hundred and Seven.

[Seal Supreme Court, Territory of Hawaii.]

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

f [Endorsed:] In the Supreme Court of the United States of America. L. L. McCandless, Plaintiff-in-Error, and George R. Carter, *et al.* Defendants-in-Error. Writ of Error and Citation. Filed June 6 1907 at 11 o'clock A. M. Henry Smith Clerk Supreme Court of the Territory of Hawaii.

Service of the within and foregoing Writ of Error and Citation and the receipt of a copy thereof admitted this 6th day of June, 1907.

E. C. PETERS,
Attorney General for the Territory of Hawaii, and Attorney for George R. Carter and James W. Pratt, Defendants in Error.

g In the Supreme Court of the Territory of Hawaii.

L. L. McCANDLESS, Complainant & Plaintiff in Error,
vs.
GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAS. W. PRATT, Commissioner of Public Lands of the Territory of Hawaii, Respondents & Defendants in Error.

UNITED STATES OF AMERICA, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered 1 to 69, inclusive, contain a true and complete transcript of the Record and Proceedings had in said Court in the cause of L. L. McCandless, Complainant and Plaintiff in Error, against George Carter, Governor of the Territory of Hawaii, and Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, Respondents and Defendants in Error, according to the Præcipe of Transcript filed in said cause by the plaintiff in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at Honolulu in the said Territory of Hawaii, this 6th day of June, in the year of Our Lord One Thousand Nine Hundred and Seven.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk Supreme Court of the Territory of Hawaii.

1 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

L. L. McCandless, Complainant,

vs.

George R. Carter, Governor of the Territory of Hawaii, and Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, Respondents.

Stamps $2.00.

Bill in Equity for Injunction.

To the Honorable the Presiding Judge at Chambers of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

L. L. McCandless of Honolulu, County of Oahu, Territory of Hawaii, brings this his Bill against Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, and having his office in said Honolulu, County and Territory aforesaid and George R. Carter, Governor of the Territory of Hawaii, having his office in the same place.

And thereupon your orator complains and says that he is and has been for over five years last past a citizen of the United States of America, and a resident of the Territory of Hawaii, and a property owner and tax payer in said Territory, and that he has paid and does now pay yearly a large sum of money to the Territory of Hawaii for his your Orator's personal and property taxes;

2 And your Orator further showeth unto your Honor that the Respondent herein Jas. W. Pratt is now and has been for over two years last past the duly and legally appointed, commissioned qualified and acting Commissioner of Public Lands for the Territory of Hawaii;

And your Orator further showeth unto your Honor that the Respondent herein George R. Carter, is and for more than two years last past has been the duly and legally appointed, commissioned qualified and acting Governor of the Territory of Hawaii;

And your Orator further showeth unto your Honor that the Territory of Hawaii is the owner of certain public lands upon the Island of Lania, Territory of Hawaii more particularly described as follows:

1st. All those certain public lands known as and called "Kamoku" containing an area of 8.291 acres, and those public lands known as "Poomai" containing an area of 9.078 acres, all of said lands being now leased to Charles Gay by the Territory of Hawaii under Government Lease No. 167, dated December 19th, 1890, for the term of 25 years, said lease expiring January 1st, 1916, at an annual rental of $569 lawful money of the United States of America;

2nd. All those certain public lands known as and called "Mapana" containing an area of 7,900 acres said land being now leased

to Charles Gay by the Territory of Hawaii under Government Lease No. 220, dated November 1st, 1876, for the term of 31 years, said lease expiring November 1st, 1907, at an annual rental of $100.00 lawful money of the United States of America;

3 3rd. All those certain public lands known as and called "Kalulu" containing an area of 6,000 acres, 5,000 acres of which said land are now leased to Charles Gay by the Territory of Hawaii under Government Lease No. 569, dated June 2, 1904, for the term of 21 years said lease expiring June 2, 1925, at an annual rental of $600.00 lawful money of the United States of America;

4th. All those certain public lands known as and called "Kaunolu" containing an area of 7,400 acres, said land being now leased by the Territory of Hawaii to Charles Gay under Government Lease No. 279, dated February 9, 1880 for the term of 27 years, said lease expiring February 9, 1907, at an annual rental of $250 lawful money of the United States of America;

5th. All those certain public lands known as and called "Kealia-Paawili" containing an area of 6,300 acres; and all those certain lands known as and called "Kamao" containing an area of 2,700 acres, all of said lands containing an area in all of 9,000 acres being now leased by the Territory of Hawaii to Charles Gay under Government Lease No. 168, dated June 23, 1873, for the term of 35 years said lease expiring June 23, 1908, at an annual rental of $150 lawful money of the United States of America;

And your Orator further showeth unto you Honor that the Island of Lanai, Territory of Hawaii, contains a total area of not more than 86,400 acres and that out of said total area of 86,400 acres the Territory of Hawaii holds as public lands only the lands above described by name containing a total area of 47,669 acres, that said 47,669 acres constitutes more than one-half of the total area of said Island of Lanai;

4 And your Orator further showeth unto your Honor that on the 28th day of November, 1906, the respondent herein George R. Carter, as Governor of the Territory of Hawaii caused to be promulgated the following order, towit:

"Lanai Lands.—Notice is hereby given that having decided an exchange of the Public Lands of the Island of Lanai to be advisable, the Commissioner of Public Lands is prepared to receive offers of other lands that are equal in value to those of Lanai, and of greater immediate service to the Territorial government, from any responsible person, up to and including Saturday, the fifteenth day of December, 1906.

G. R. CARTER, *Governor.*

Executive Building, Honolulu, November 28, 1906."

That said order and notice was printed and published in the daily papers of the Territory of Hawaii, and more particularly in the Hawaiian Star by order of the said George R. Carter, Governor as aforesaid, on the 28th day of November, 1906, and the 1st, 4th, 8th and 11th of December, 1906;

And your Orator further showeth unto your Honor that the said George R. Carter as Governor aforesaid and the said Jas. W. Pratt as Commissioner of Public Lands as aforesaid each and both decided, prior to said 28th day of November, 1906, to exchange all the said public lands on the island of Lanai for other lands, and in pursuance of said decision the said respondent George R. Carter as Governor aforesaid, and the said Jas. W. Pratt as the Commissioner of Public Lands as aforesaid have issued said advertisement
5 above set forth calling for offers to be given the said Commissioner of Public Lands of other lands "that are equal in value to those of Lanai and of greater immediate service to the Territorial Government from any responsible person up to and including the 15th day of December, 1906;"

And your Orator further showeth unto your Honor that your Orator is informed and believes and upon such information and belief alleges that the said Jas. W. Pratt as Commissioner of Public Lands as aforesaid threatens to and will exchange said public lands on the island of Lanai for other lands equal in value to those of Lanai in case said Pratt receives and offer therefor from a responsible person; and the said George R. Carter as Governor of the Territory of Hawaii as aforesaid threatens to and will consent to and approve of such an exchange, unless he the said Pratt, and he the said Carter, be restrained and enjoined from so doing;

And your Orator further showeth unto your Honor that the said Jas. W. Pratt as Commissioner of Public Lands for the Territory of Hawaii has no legal right or authority to exchange said public lands of Lanai above described, for other lands of equal value, or any other lands at all and said George R. Carter as Governor of the Territory of Hawaii has no legal right or authority to consent to or approve of said threatened and intended exchange of said Lanai lands;

And your Orator further showeth unto your Honor that the intended and proposed exchange of said Lanai lands as aforesaid is not proposed by way of compromise or equitable settlement of the rights of any claimants, nor by way of exchange for parcels
6 of land acquired for any road or roads, nor for a site or sites of a government building or buildings, nor for any other purpose or purposes;

And your Orator further shows unto your Honor upon information and belief that the said public lands of Lanai are of great value, the said land of "Kamoku" containing about 8,000 acres of land which is good grazing land, and having about 3 miles of sea frontage with a good harbor; that said land extending inland about 6 miles and *having* a value of $40,000; and that the said public land known as and called "Paomai" which is good grazing land, having about 5½ miles of sea frontage including a fair harbor or landing, and extending inland over 6 miles, has a value of $37,000.

And your Orator further shows unto your Honor that the tracts of said public lands of Lanai other than said lands of "Kamoku" and "Paomai" are also of great value each of said tracts of land being worth more than the sum of $5,000;

And your Orator further shows unto your Honor that the ex-

change of said public lands aforesaid by the said Jas. W. Pratt as Commissioner of Public Lands as aforesaid, and the said George R. Carter as Governor of the Territory of Hawaii as aforesaid is not authorized by any law of the Territory of Hawaii or of the United States of America, and that both said Jas. W. Pratt and said George R. Carter should be enjoined and restrained from exchanging said public lands aforesaid;

And your Orator further showeth unto your Honor that your Orator is remediless in the premises at and by the strict rules of the common law and is only relievable in a Court of Equity where matters of this kind are properly cognizable and relievable;

7 And your Orator further prays your Honor that a Writ of Injunction be issued by your Honor under the seal of this Honorable Court, directing, commanding, enjoining and restraining Respondent Jas. W. Pratt as Commissioner of Public Lands of the Territory of Hawaii from exchanging the lands above described or any part thereof, and from issuing any land patents to said lands above described in exchange for any other lands; and directing, commanding and enjoining the Respondent, George R. Carter as Governor of the Territory of Hawaii from consenting to or approving of any exchange of said lands as aforesaid or the issuing of any land patent therefor;

And your Orator further prays that process of this Court may issue commanding the Respondents herein to appear and answer this Bill of Equity as is usual in such proceedings and that your Orator may have such further or other relief in the premises as the nature of the circumstances of this case may require and to this Honorable Court shall seem meet;

And your Orator further prays that your Honor grant a temporary injunction against the Respondent Jas. W. Pratt as Commissioner of Public Lands enjoining and restraining said Respondent from exchanging the public lands of Lanai described herein, or any part thereof, and from issuing any land patents to said lands in exchange for other lands until further order of your Honor; and restraining and enjoining the Respondent George R. Carter, as Governor of the Territory of Hawaii from consenting to or approving of any exchange of said public lands as aforesaid or the issuing of any land patents therefor, until further order of your Honor;

8 And your Orator as in duty bound will ever pray.

(S'g'd) L. L. McCANDLESS, *Complainant.*

(S'g'd) GEO. D. GEAR,
Attorney for Complainant.

9 TERRITORY OF HAWAII, *County of Oahu, ss:*

L. L. McCandless being first duly sworn deposes and says, that he is the Complainant above named, that he has read the above complaint and knows the contents thereof, and that the same are true excepting as to those matters therein stated on information and belief and as to those he believes it to be true.

(S'g'd) L. L. McCANDLESS.

Subscribed and sworn to before me this 14th day of December, A. D. 1906.

(S'g'd) W. J. ROBINSON,
Third Judge, First Circuit Court.

Endorsed: Filed December 14, 1906, 5:25 P. M. (S'g'd) M. T. Simonton, Clerk.

10 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

L. L. McCANDLESS, Complainant,
vs.
GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAS. W. PRATT, Commissioner of Public Lands for the Territory of Hawaii, Respondents.

Stamps $2.00.

Temporary Injunction.

To George R. Carter, Governor of the Territory of Hawaii and Jas. W. Pratt, Commissioner of Public Lands for the Territory of Hawaii:

The Complainant in the above entitled cause having brought his Bill of Equity in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, at Chambers, against the above named Respondents, for an Injunction against said Respondents enjoining and restraining them from doing certain acts in said petition and hereinafter more particularly mentioned;

Now therefore, on reading said petition in said cause duly verified by the oath of the Complainant herein and it satisfactorily appearing to me therefrom that an Injunction should issue, and that sufficient grounds existed therefor.

It is therefore ordered by me W. J. Robinson, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of
11 Hawaii, sitting in Equity at Chambers that until further order in the premises you, the said Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, do absolutely refrain and desist from exchanging the public lands of Lanai known as and called the kinds of Kamoku, Paomai, Makana, Kalulu, Kaunolu, Kealia-Paawili and Kamao, or any part thereof, and from issuing any land patent or patents to said lands in exchange for other lands; and that until further order in the premises you the said George R. Carter, Governor of the Territory of Hawaii, do absolutely refrain and desist from consenting to or approving of any exchange or said public lands herein mentioned or the issue of any land patent therefor.

Dated this 14th day of December, A. D., 1906.

(S'g'd) W. J. ROBINSON,
Third Judge of the Circuit Court of the First Judicial Circuit, of the Territory of Hawaii.

Endorsed: Filed December 14, 1906 5:25 P. M. (S'g'd) M. T. Simonton, Clerk.

12 In the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers. In Equity.

L. L. McCandless, Complainant,

v.

George R. Carter, Governor of the Territory of Hawaii, and Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, Respondents.

Stamps $2.00.

Chambers Summons.

The Territory of Hawaii to the high sheriff of the Territory of Hawaii or his deputy, the sheriff of the county of Oahu or his deputy:

You are hereby commanded to summon George R. Carter Governor of the Territory of Hawaii and Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii to appear 10 days after service herein, if they reside in the County of Oahu, otherwise 20 days after service, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the Court-Room at Honolulu, County of Oahu, Territory of Hawaii, to answer the annexed Bill for Injunction of L. L. McCandless.

And you are further commanded, by order of the Honorable Judge of the Circuit Court of the —— Circuit ——.

And have you then there this Writ with full return of your proceedings thereon.

13 Witness the Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Circuit, at Honolulu this 14th day of December, A. D. 1906.

[SEAL.] (S'g'd) M. T. SIMONTON, *Clerk.*

On the left hand margin of the first page of the above Bill in Equity for Injunction, the following note appears:

The within cause is hereby assigned and transferred to the Honorable John T. De Bolt, First Judge of this Court for any and all further and future proceedings.

(S'g'd) W. J. ROBINSON,
Third Judge.

Served the within Summons as follows:

On George R. Carter, Governor of the Territory of Hawaii, this 15th day of December, 1906, at Honolulu.

On Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, at Honolulu, this 15th day of December, 1906, by delivering to each of them a certified copy hereof and of the petition or complaint annexed hereto and at the same time showing each of them the original also served on said George R. Carter, Governor of the Territory of Hawaii, and Jas. W. Pratt, Commissioner of

Public Lands of the Territory of Hawaii, a certified copy of the Bill of Injunction as directed.

Dated Honolulu, December 15th, 1906.

(S'g'd) J. S. KALAKIELA,
Deputy Sheriff.

Endorsed: Issued at 5:30 o'clock P. M., December 14, 1906. (S'g'd) M. T. Simonton, Clerk. Returned at 11:05 o'clock A. M. December 15, 1906. (S'g'd) L. P. Scott, Clerk.

14 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

L. L. McCandless, Complainant,

vs.

George R. Carter, Governor of the Territory of Hawaii, and James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, Respondents.

Bill in Equity for Injunction.

Motion to Dissolve Temporary Injunction and Dismiss Bill of Complaint as to George R. Carter, Governor of the Territory of Hawaii.

To the Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Judicial Circuit:

Now comes E. C. Peters, Attorney General of the Territory of Hawaii, on behalf of George R. Carter, Governor of the Territory of Hawaii, one of the respondents above named, to whom heretofore to wit, on the 14th day of December, A. D. 1906, was issued by your honor in the above entitled cause a purported and pretended temporary injunction and restraining order, and appearing especially for the purpose hereof and none other, respectfully suggests to your honor that you are without and should not take jurisdiction of the person of the said respondent, and respectfully moves that the said purported and pretended temporary injunction and restrain-
15 ing order be dissolved and the bill of complaint herein be dismissed as to said respondent on the grounds following, that is to say:

I.

That your honor is without jurisdiction of the person of this respondent as Governor of the Territory of Hawaii.

II.

That the bill of complaint and purported and pretended temporary injunction and restraining order herein is an attempt to interfere with and coerce and restrain the Governor of the Territory of Hawaii in the exercise of his discretion in the execution of his powers as provided by law.

III.

That the purported and pretended temporary injunction and restraining order is an unwarranted and illegal assumption of judicial control of the official acts of the Governor of the Territory of Hawaii.

The foregoing suggestion and motion is made upon the bill of complaint and restraining order herein and the entire record and proceedings had.

(S'g'd) E. C. PETERS,
Attorney General of the Territory of Hawaii.

To L. L. McCandless, the complainant above named and George D. Gear, his counsellor and solicitor:

You and each of you will please take notice that the foregoing suggestion and motion will be presented to the Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Judicial Circuit, in his Court Room in the Judiciary Building, in Honolulu, Island and County of Oahu, on Monday, the 24th day of December, A. D. 1906, at the hour of Ten O'Clock in the morning of
16 said day, or as soon thereafter as counsel can be heard.

Dated, Honolulu, this 21st day of December, A. D. 1906.

(S'g'd) E. C. PETERS,
Attorney General of the Territory of Hawaii.

Endorsed: Filed 10.30 A. M. December 21st, '06. (S'g'd) L. P. Scott, Clerk.

17 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

L. L. McCandless, Complainant,

vs.

George R. Carter, Governor of the Territory of Hawaii, and Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, Respondents.

Bill in Equity for Injunction.

Demurrer to Bill.

Now comes James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, by E. C. Peters, Attorney General of the Territory of Hawaii, and Fred W. Milverton, Deputy Attorney General of the Territory of Hawaii, and demurs to the Bill in Equity of the said Complainant L. L. McCandless, filed herein and for grounds of demurrer avers:

I.

That said Bill does not state facts sufficient to warrant the issuance of any injunction temporary or permanent or to entitle the said

Complainant L. L. McCandless to the relief prayed for therein or to any relief in a Court of Equity.

II.

That it does not appear from said Bill that the said Respondent, James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, is doing or performing, or about to do or perform any act in violation of law.

18 III.

That it does not appear by said Bill that the said Complainant L. L. McCandless, has any legal capacity to bring same.

IV.

That said Bill does not state facts sufficient to constitute any injury threatened or otherwise to the said Complainant L. L. McCandless.

V.

That the said Complaint has not in said Bill shown sufficient or any interest in the subject matter thereof to entitle him to the temporary and permanent injunctions prayed for or to any relief whatsoever in a Court of Equity.

VI.

That said Bill is not sufficiently or properly verified as to entitle the said Complainant to either a temporary or permanent injunction.

VII.

That said portion of said Bill which alleges that the said Respondent James W. Pratt as Commissioner of Public Lands for the Territory of Hawaii has no legal right or authority to exchange public lands of Lanai, described in said Bill, for other lands in equal value or any other lands at all, states and alleges conclusions of law.

VIII.

That said portion of said Bill which alleges that an exchange of the public land described in said Bill by the said James W.
19 Pratt as Commissioner of Public Lands of the Territory of Hawaii or of the United States of America, and that the said James W. Pratt should be enjoined and restrained from exchanging said public lands, states and alleges conclusions of law.

Wherefor- the said Respondent prays that said Bill in Equity be dismissed and for his costs therein.

JAMES W. PRATT,
Commissioner of Public Lands of the Territory of Hawaii,
(S'g'd) By E. C. PETERS,
Attorney General of the Territory of Hawaii and
(S'g'd) FRED W. MILVERTON,
Deputy Attorney General of the Territory of Hawaii.

Certificate.

We, E. C. Peters, Attorney General of the Territory of Hawaii, and Fred W. Milverton, Deputy Attorney General of the Territory of Hawaii, acting as Attorneys for the said James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, do hereby certify that the foregoing Demurrer is interposed in good faith and is not intended for delay.

(S'g'd) E. C. PETERS,
Attorney General of the Territory of Hawaii.
(S'g'd) FRED W. MILVERTON,
Deputy Attorney General of the Territory of Hawaii.

20 *Notice.*

To L. L. McCandless, Esq., and to George D. Gear, his attorney:

You and each of you will please take notice that the foregoing Demurrer will be presented to the Honorable John T. De Bolt, Judge of the above entitled Court, for hearing, on Monday, the 24th day of December A. D., 1906, at 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the Chambers of said Judge, in the city of Honolulu, Territory of Hawaii.

(S'g'd) E. C. PETERS,
Attorney General of the Territory of Hawaii.
(S'g'd) FRED W. MILVERTON,
Deputy Attorney General of the Territory of Hawaii.

Endorsed: Filed December 21/06 at 3:30 P. M. (S'g'd) J. A. Thompson, Clerk.

21 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers.

Clerk's Minutes.

Friday, December 28th, 1906, 9 A. M., before the Hon. J. T. De Bolt, First Judge.

Equity. 1550.

L. L. McAndless
vs.
George R. Carter, Governor of the Territory of Hawaii, and James W. Pratt, Com'r of Public Lands of Territory of Hawaii.

Bill in Equity for Injunction.

Motion to Dissolve Temporary Injunction and Dismiss Bill of Complaint as to George R. Carter, Governor of Territory.

Court granted the motion to Dissolve Temporary Injunction and Dismiss Bill of Complaint as to George R. Carter.

(S'g'd) JOB BATCHELOR, *Clerk.*

22 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

L. L. McCandless, Complainant,

vs.

George R. Carter, Governor of the Territory of Hawaii, and James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, Respondents.

Bill in Equity for an Injunction.

Opinion.

This is a bill in equity whereby the complainant as a citizen and tax-payer seeks to have the Commissioner of Public Lands restrained from exchanging certain public lands on the Island of Lanai for other lands; and also to have the Governor enjoined from approving of such exchange.

Upon the bill being filed an order, temporarily restraining the respondents, was signed. Thereafter, the Attorney General, appearing specially on behalf of the Governor, moved that the temporary restraining order be dissolved and the bill dismissed as to the Governor on the grounds that the court was without jurisdiction of the person of the respondent as Governor, and that the bill and temporary restraining order was an attempt to interfere with the Governor in the exercise of his discretion in the execution of his powers, and that the order was also an unwarranted and illegal assumption of judicial control of the official acts of the Governor.

23 The court orally granted this motion and ordered that the temporary injunction be dissolved and that the bill be dismissed as to the Governor; the court in so ruling taking into consideration all the grounds urged on behalf of the motion, but more particularly the ground that the restraining order was an attempt to interfere with the discretionary powers of the Governor, and also upon the further ground that in no event could or would the Governor be called upon to exercise his discretion until the Commissioner had made such exchange, which he could not do during the continuance of the temporary restraining order, and if this order were made permanent that would necessarily end the whole matter. The inability of the Commissioner to act pending these proceedings obviating the necessity, if any existed, for the continuance of the temporary restraining order as to the Governor.

The Attorney General, on behalf of the Commissioner, interposed a demurrer to the bill which was orally argued and submitted by counsel; whereupon the court took the matter under advisement, requesting counsel to file briefs upon two points raised by the demurrer, namely:

(1.) Whether or not complainant as a citizen and tax-payer had the right to bring and to maintain this suit.

(2.) Whether or not the threatened act of the Commissioner to

exchange said public lands for other lands is unauthorized by law and therefore illegal.

As to the first point, the Attorney General contends that the complainant can not maintain this suit as a citizen and tax-payer, unless he has suffered some special injury not in common with others, and that it is incumbent upon him to allege this special injury to himself, as being different from that suffered by the community at large.

The general rule governing the jurisdiction in equity against public officers is that equity will interpose in behalf of in-
24 dividuals to restrain all illegal and unauthorized acts by them under color and claim of official authority which tend to impair public rights."

Spelling, Injunction etc., Secs. 609-614.

Mechem on public officers, at Sec. 996, after some discussion as to the right of a citizen or tax-payer to maintain suits of this character, and also as to the duty of the Attorney General in such suits in some states, says: "But by the great preponderance of authority, it is settled that any single tax-payer, or any number of them, may intervene to prevent by injunction an unlawful levy, appropriation or expenditure by which the burden of the tax-payer as such would be unjustly and illegally increased, and that a special or peculiar interest or injury is not indispensable."

In Castle *vs.* Kapena, 5 Haw. 27, Chief Justice Judd said: "I am of the opinion that the petitioners, as citizens and tax-payers, have the right to sue out this writ. They have, as tax-payers, the right to endeavor to prevent a public officer from doing what is an injury to the public good. There are authorities on both sides of the question, but the current seems to be in favor of the right, and the case of Crampton *vs.* Zabriskie, 101 U. S. 609."

Also, in Lucas *vs.* Amer. Haw. E. & C. Co. 16 Haw. 86, the court say: "The right of a tax-payer to bring suit to restrain a public officer from doing an illegal act has been settled in this jurisdiction since the case of Castle *et al. vs.* Kapena, 5 Haw. 27 (1883). If the question could be considered an open one we should follow the rule laid down in Crampton *v.* Zabriskie, 101 U. S. 601, and in R. P. R. Co. *v.* Hall, 91 U. S. 343, cited in Castle *v.* Kapena. It is not necessary that the plaintiff should show actual damage to himself and to all others similarly situated, as is contended by the Assistant Attorney General."

25 Again, in Castle *v.* Sec. of Ter., 16 Haw. 770, wherein the defendant contended that equity has no jurisdiction to grant an injunction against him at the suit of a tax-payer or of a bondholder whose bonds are not shown to be in danger of being defaulted; the court, after holding that a tax-payer could maintain the suit, say: "State decisions for and against the exercise of jurisdiction such as is claimed by the plaintiff are interesting and of value to the student of law, but as above stated, the question has been decided by this court in favor of the exercise."

From an examination of the cases cited it clearly appears that the Supreme Court of these Islands, under the Monarchy, Republic and

Territorial government, have not in a single instance failed to recognize and uphold the right of the tax-payer to institute and maintain suits of this character. And the reason, as well as the utility of this rule, in this jurisdiction becomes apparent when we stop to consider that the law makes it the duty of the Attorney General to appear in defense of actions brought against Government officers and leaves the rights of the public practically unprotected when in conflict with one of its officers. (Sec. 1549, R. L.; 5 Haw. 35.) If suits of this kind could not be maintained by a citizen and tax-payer there would then be no adequate way in which the rights of the public could be protected from the arbitrary and illegal acts of a public officer.

To my mind it is a monstrous proposition to urge that a public spirited citizen and tax-payer has no standing in a court of equity in a suit thus brought to protect the rights of the people against the illegal and unwarranted acts of a public officer. A citizen or tax-payer, without suffering any special injury peculiar to himself, who is willing and able to undertake a task of this character in good faith and to assume the burden and annoyance incident
26 thereto, for the benefit of the public in general is to be commended.

"The right of a tax-payer to bring a suit to restrain a public officer from doing an illegal act has been settled in this jurisdiction" beyond all question.

This brings us to the consideration of the second point raised by the demurrer, namely, whether or not the proposed exchange is an illegal act. The bill alleges that the public lands sought to be exchanged are leased to Charles Gay.

It also appears that the area of the lands which it is proposed to exchange is 47,669 acres, same being all the public lands on the Island of Lanai, of which area Mr. Gay holds Government leases for 46,669 acres, paying to the Territorial Government large sums annually as rent therefor. It also appears that the total area of the Island of Lanai is not more than 86,400 acres.

Under Sec. 276, R. L., "The commissioner may with the consent of the governor sell public lands not under lease, in parcels of not over one thousand acres, at public auction for cash. * * * And he may, with such consent, sell public lands not under lease in parcels of not over six hundred acres, at public auction upon part credit and part cash. * * * *Provided*, however, that land patents may be issued in exchange for deeds of private lands or by way of compromise upon the recommendation of the commissioner and with the approval of the governor without an auction sale. * * *"

It is important to observe that this Section, (276, R. L.), deals only with "Public lands not under lease." And it is, therefore, wholly immaterial whether such lands are to be sold for cash, or upon part credit and part cash, or exchanged for private lands, they must be "public lands not under lease."

This, to my mind disposes of the whole question.

However, if there remains any question as to the intent and scope

of Sec. 276, and as to whether or not it deals with public
27 lands under lease, or only with public lands not under lease, we shall find that Secs. 278 and 285 inclusive, covers, as it would seem, every possible phase of the management and disposition of public lands under lease, including the land in question, and that no provision is contained therein, as in Sec. 276, for the sale or exchange of public lands.

It will also be observed upon an examination of the foregoing Sections that not only is the government precluded from selling public lands under lease but can not even lease them while there is an existing lease having more than two years to run. (Sec. 278, R. L.) Moreover, it will be further observed that Chapter 22, R. L., of which Sec. 276 is a part, was enacted in 1895 and designated "Land Act of 1895," which Act is clear and explicit in its terms. And that part thereof, now Sec. 276, R. L., is a limitation of the general powers contained in Sec. 252, R. L.

Now, regarding the proviso in Sec. 276. It is obvious, in the light of the foregoing examination, that the power of the Commissioner in the matter of an exchange, is limited to "public lands not under lease," the same as in sales for cash or part cash and part credit. The only office this proviso serves is that it dispenses with "an auction sale."

And, it would seem from the use of the phrase "an auction sale," that the Legislature regarded an exchange as a sale, thus confining an exchange to the same character of public lands as mentioned in the preceding part of the Section.

"The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it unless it clearly appears to have been intended to apply to some other matter." (There is nothing in the Section or the proviso itself that would indicate that the proviso was in-
28 tended to apply to any public lands other than those not under lease. "It is to be construed in connection with the section of which it forms a part, and it is substantially an exception." (In the matter of an exchange "an auction sale" is excepted, *i. e.*, an auction is not required.) "If it be a proviso to a particular section, it does not apply to others unless plainly intended." (Thus it would seem perfectly clear that the proviso in question does not apply to public lands under lease, which are covered by Sections 278-285.) "It should be construed with reference to the immediately preceding parts of the clause to which it is attached. * * * The proper function of a proviso being to limit the language of the legislature, it will not be deemed intended from doubtful words to enlarge or extend the *act* or the *provision* on which it is engrafted. Where it follows and restricts an enacting clause general in its scope and language, it is to be strictly construed and limited to objects fairly within its terms."

Lewis' Suth. St. Const., Sec. 352.

In U. S. *vs.* Dickson, 15 Pet. 141, Mr. Justice Story said: "We are led to the general rule of law which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes,

that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of its enacting clause which does not fall fairly within its terms." If then, in the light of the foregoing authorities, "the proviso is to be confined to what precedes it" and "it will not be deemed intended from doubtful words to enlarge or extend the act or provision on which it is engrafted," and "it is to be strictly construed and limited to objects fairly within its terms," the court must find that the proviso in question is limited to the subject matter of the statute upon which it is engrafted, that is, to "public lands not under lease in parcels of not over 1000 acres," and
29 that it was not intended "to enlarge or extend" the act upon which it was engrafted so as to cover public lands under lease in parcels of over 47,000 acres, more than one half of one of the Islands of this Archipelago. If the proviso is to be "strictly construed and limited to objects fairly within its terms" how can the court hold that it extends to and covers public lands "under lease" and in areas of over 1000 acres each. The lands in question are not fairly or at all within the terms of the proviso. "The beneficial purpose" as well as the policy and spirit of the "Land Act of 1895," was to limit the transfer of any land in parcels of over 1000 acres. The same policy and spirit should pervade and control the proviso.

Can it be asserted with any show of reason that a construction of the proviso allowing the exchange of over 47,000 acres of the public lands, and every foot of land owned by the Territory on one of our important Islands, is in furtherance of the general beneficial purpose of the statute, which is to restrict the sale of public lands in parcels of not over 1000 acres each?

At the oral argument on the demurrer it was argued by the Attorney General that the bill did not show that the Commissioner threatened or intended to dispose of more than 1000 acres of these lands to any one person.

It appears from a certain official notice, which is made a part of the bill, that the Commissioner "is prepared to receive offers of other lands that are equal in value to those of Lanai, and of greater immediate service to the Territorial Government, from any responsible *person.*" Thus it clearly appears that offers of other lands in exchange for the entire area of 47,669 acres were to be received by the Commissioner "from any responsible *person.*" And, upon such offers being found satisfactory to and accepted by the Commissioner, the 47,669 acres of public lands, "under lease," were to be
30 conveyed to *one man.*

However, even though this may not be as it appears, and this vast area of public lands is not to be conveyed to one individual, still, as the area of each tract, which composes the land in question, exceeds the 1000-acre limit, this, as it would seem, rebuts the idea of a transfer of 1000 acres or less to one person.

The name and area of each tract is as follows:

Kamoku,	containing.....	8,291	acres,
Paomai,	"	9,078	"
Mapana,	"	7,900	"
Kalulu,	"	6,000	"
Kaunolu,	"	7,400	"
Kealia-Paawili	"	6,300	"
Kamoo,	"	2,700	"
Total area.....		47,669	"

Having reached the conclusion that the facts set forth in the Bill are sufficient to warrant a decree for the relief prayed for, and that the Complainant had the right to bring this suit, as well as the right to maintain the same, and that the proposed exchange of the public lands described in the bill for other lands is unlawful, illegal and unwarranted, the demurrer, therefore, is overruled.

The respondent, Jas. W. Pratt, may have ten days within which to file such further or other answer or pleading to the Bill as he may be advised, otherwise, the writ to be made permanent.

(S'g'd) J. T. DE BOLT,
First Judge.

Jan. 12, 1907.

GEO. D. GEAR,
Att'y for Complainant.
E. C. PETERS,
Attorney General and
FERD. W. MILVERTON,
Deputy Attorney General for the Respondents.

Endorsed: Filed Jany. 12th, 1907, 9.37 A. M. Job. Batchelor, Clerk.

31 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

L. L. McCANDLESS, Complainant,
vs.
GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAS. W. PRATT, Commissioner of Public Lands of the Territory of Hawaii, Respondents.

Bill in Equity for Injunction.

Interlocutory Decree Overruling Demurrer to Bill.

It is hereby ordered, adjudged and decreed that the Demurrer interposed by the above named Respondent, Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, to the Bill of Complaint herein, be, and the same is hereby overruled.

Dated this 14th day of January, A. D., 1907.

(S'g'd) J. T. DE BOLT,
First Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers.

Endorsed: Filed January 14, 1907 at 12 noon. (S'g'd) J. A. Thompson, Clerk.

32 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

L. L. McCANDLESS, Complainant,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii, Respondents.

Bill in Equity for Injunction.

Notice of Appeal and Appeal.

Now comes James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, one of the respondents above named, and gives notice of appeal and hereby does appeal to the Supreme Court of the Territory of Hawaii from the interlocutory decree heretofore, on the 14th day of January, A. D. 1907, rendered by the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers, in the above entitled cause, overruling the Demurrer of the said respondent to the Bill in Equity filed by the said complainant in the above entitled court and cause, and from each and every part of said decree.

Dated Honolulu this 14th day of January, A. D. 1907.

JAMES W. PRATT,
Commissioner of Public Lands of the Territory of Hawaii,
(S'g'd) By FRED. W. MILVERTON,
Deputy Attorney General.

Endorsed: Filed January 14, 1907, at 4.43 P. M. (S'g'd) J. A. Thompson, Clerk.

33 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

L. L. McCANDLESS, Complainant,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii, Respondents.

Bill in Equity for Injunction.

(Stamp $1.00.)

Bond on Appeal from Interlocutory Decree.

Know all men by these presents that James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, one of the respond-

ents above named, as principal, and M. T. Lyons as surety, are held and firmly bound unto Henry Smith, Esq., Clerk of the Judiciary Department of the Territory of Hawaii, in the penal sum of fifty dollars ($50) which sum well and truly to be paid we bind ourselves, our heirs, administrators, executors, assigns and successors firmly by these presents.

Sealed with our seals and dated at Honolulu this 14th day of January, A. D. 1907.

The conditions of this obligation are as follows:

Whereas in a certain proceeding pending in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii at Chambers, in Equity, in which L. L. McCandless was complainant and
34 George R. Carter, Governor of the Territory of Hawaii and James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, were respondents, an interlocutory decree overruling the Demurrer of the said respondent James W. Pratt was rendered on the 14th day of January, A. D. 1907, by the Honorable John T. De Bolt, First Judge of said Court,

And whereas the said respondent James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, deems himself aggrieved by the said interlocutory decree of said Judge, and has given notice of appeal and has appealed from the said interlocutory decree to the Supreme Court of the Territory of Hawaii,

Now therefore if said appeal is perfected and all the costs of said appeal, in case the said respondent fails to sustain the same, are paid, then this obligation shall be void, otherwise to remain in full force and effect.

It is the intention of the parties hereto that this obligation shall cover all costs on appeal until the final determination of the above entitled cause.

(Signed) JAS. W. PRATT,
Commissioner of Public Lands of the Territory of Hawaii, Principal.

(Signed) M. T. LYONS, *Surety.*

Endorsed: E. 1550. Reg. 1 289. Circuit Court, First Circuit Territory of Hawaii. At Chambers. In Equity. L. L. McCandless, Complainant, *vs.* Geo. R. Carter, Governor *et al.* Respondents. Bond on Appeal from Interlocutory Decree. Filed January 14/07, at 4:44 P. M. J. A. Thompson, Clerk. E. C. Peters, Atty. Gen'l and Fred. W. W. Milverton, Dep. Atty. Genl. for Respondents.

35 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

L. L. McCandless
v.
George R. Carter, Governor of the Territory of Hawaii and James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii.

Appeal from Circuit Judge, First Circuit.

Submitted January 25, 1907; Decided February 1, 1907.

Frear, C.J., Hartwell and Wilder, JJ.

Equity practice—*injunctions, whether issued on averments upon information and belief—against public officers, right of citizen to obtain.*—Injunctions, as a general thing, ought not to be issued upon statements of material matters made upon in-
36 formation and belief. An averment of the value and kind of lands being largely a matter of information and belief is sufficient.

Bill for injunction by a citizen and taxpayer.—Whether a bill by a citizen and taxpayer to obtain an injunction to restrain public officials from unauthorized acts affecting public property exists in cases where there is no pecuniary loss to the plaintiff, quaere.

Public lands—*exchange for private lands—power of commissioner under Secs. 252 and 276, R. L., limitation of.*—The power of the commissioner of public lands in the matter of exchanging public for private lands is not found in Sec. 252, R. L., but in Sec. 276, R. L., and is not confined to lands not under lease or to parcels of not over 1000 acres.

Exercise of discretionary power by public officials—*injunctions against.*—Injunctions are not issued to restrain public officials in the exercise of discretionary power.

Opinion of the Court by Hartwell, J.

This was a bill to obtain an injunction restraining the governor and the commissioner of public lands from exchanging for private lands certain public lands on the Island of Lanai having an area of 47,669 acres of which all but 1000 acres are held by one Charles Gay under five leases terminating respectively February 9, 1907, of 7400 acres; November 1, 1907, of 7900 acres; June 23, 1908, of 9000 acres; January 1, 1916, including the lands of Kamoku, area 8291 acres and Poomai, area 9078 acres, and January 2, 1925, of 5000 acres, the total annual rentals being $1600.

The bill avers that the commissioner threatens to and will exchange said public lands for other lands equal in value and that the

governor threatens to and will approve of the exchange unless restrained and enjoined from so doing; that the governor caused the following notice to be published in the daily newspapers: "Lanai Lands. Notice is hereby given that having decided an Exchange of the Public Lands on the Island of Lanai to be advisable, the Commissioner of Public Lands is prepared to receive offers of
37 other lands that are equal in value to those of Lanai, *and of greater immediate service* to the Territorial Government, from any responsible person, up to and including Saturday, the fifteenth day of December, 1906. G. R. Carter, Governor. Executive Building, Honolulu, November 28, 1906;" that the commissioner has no right or authority to exchange these lands for other lands of equal value or for any other lands and that the governor has no right or authority to approve of the exchange which is not by way of compromise or equitable settlements of rights of claimants, nor by way of exchange for parcels of land required for roads, nor for sites of government buildings, nor for any other government purposes; that the lands are of great value, the said land of Kamoku, containing about 8000 acres of good grazing land with about three miles of sea frontage with a good harbor, the land extending inland about six miles, having a value of $40,000; that the said land of Poomai is good grazing land having about five and one-half miles of sea frontage, including a fair harbor or landing, and extending inland over six miles, having a value of $37,000; that each of the other lands is worth more than $5,000.

The averments made upon information and belief are that the commissioner threatens to make the exchange mentioned and those which relate to the value and condition of the lands. The jurat is in the usual form—that the plaintiff has read the complaint and knows its contents and that "the same are true, except as to those matters therein stated on information and belief, and as to those he believes it to be true." *Ex parte* injunctions were issued upon the filing of the bill but, on defendants' motion, the injunction against the governor was dissolved and the bill as to him dismissed. The commissioner's demurrer to the bill was overruled and his appeal from the decree overruling the demurrer was allowed. The demurrer raises the points (1) that the bill is insufficiently verified; (2) that the averment that the exchange is not authorized by law and that the commissioner ought to be enjoined states conclusions of
law; (3) that the plaintiff has not shown any interest which
38 entitles him to an injunction; (4) that the bill does not show that the commissioner is about to do any act in violation of law.

As a general thing injunctions ought not to issue upon statements of material matters made upon information and belief. In this case the proposed exchange is shown by the official notice published in the newspapers, the value and kind of lands proposed to be exchanged being largely a matter of information and belief. We consider that the bill properly presents the question of the legality of the proposed exchange and that it is properly verified.

The right of a citizen and taxpayer to obtain an injunction

against official acts involving unauthorized use of public funds has repeatedly been adjudicated in this court. Castle *v.* Minister of Finance, 5 Haw. 27; Lucas *v.* Amer. Haw. E. & C. Co., 16 Haw. 80; Castle *v.* Secretary of the Territory, Ib. 769. In the present case the bill does not show whether the loss of revenue from rent would be offset by rents from land of equivalent value or by a saving of revenue which otherwise would be used. In the absence of an averment of loss none can be inferred. The taxpayer would gain from the transaction pecuniarily if the Territory should thereby obtain property for such public uses as school houses, for instance, for which otherwise legislative appropriations would be made requiring increased taxation and in such cases the plaintiff's only interest would be his desire that the public land laws be correctly administered.

Perhaps a citizen and taxpayer's right to obtain injunctions to restrain official acts affecting public property ought not to be based on the pecuniary loss, howsoever trivial or conjectural, but on the broad ground that any citizen may obtain a judicial inquiry into the validity of such acts and an injunction against them if found to be unauthorized. In the view we take of the fourth question raised by the demurrer it is unnecessary to decide the question of the plaintiff's right to sue in this case.

The remaining question to be considered is whether the commissioner, by approval of the governor, has the power to make the proposed exchange. By Sec. 42 of the Civil Code of 1859, the
39 minister of the interior, by authority of the king in cabinet council had "power to lease, sell or otherwise dispose of the public lands and other property in such manner as he may deem best for the promotion of agriculture and the general welfare of the kingdom subject, however, to such restrictions as may from time to time be expressly provided by law." Chap. 24, Acts of 1874, requires consent of the privy council for sales of land above $5,000 in value, and Chap. 44, Acts of 1876, requires sales and leases of land of over $300 in value to be made only at public auction, but that this provision shall not apply to cases "where the government shall by quit claim, or otherwise, dispose of its rights in any land by way of compromise or equitable settlements of the rights of claimants, nor to cases of exchange, or sales of government lands in return for parcels of land required for roads, sites of government buildings, or other government purposes."

Sec. 42, as thus amended, and as further amended to conform to the constitution of 1894 and the Organic Act, is found in Secs. 252 and 254 R. L. Sec. 276 R. L., being Sec. 17 of the Land Act of 1895, with the amendments required by the Organic Act, is as follows:

"The commissioner may with the consent of the governor sell public lands not under lease, in parcels of not over one thousand acres, at public auction for cash. Upon any such sale and the payment of the full consideration therefor, a land patent shall be issued to the purchaser.

"And he may, with such consent, sell public lands not under lease

in parcels of not over six hundred acres, at public auction upon part credit and part cash, and deliver possession under an agreement of sale containing conditions of residence on or improvement of the premises sold, or of payment by instalments or otherwise of the purchase price, or all or any of such conditions.

"And in case of default in the performance of such conditions, the commissioner may, with or without legal process and without notice, demand or previous entry, take possession of the premises and thereby determine the estate created by such agreement. In case of such forfeiture, such land shall be sold at auction
40 either as a whole or in parcels, for cash or on terms of time payments in the discretion of the commissioner; and if such sale shall result in an advance on the original price, the original purchaser shall receive therefrom the amounts of his payments to the government on account of purchase, without the interest and a pro rata share in such advance in proportion to the amounts of his payments. If such sale shall result, however, in a less price than the original, the amount returnable to him shall be charged with a pro rata amount of such decrease proportioned to the amounts of his payments. The treasurer is hereby authorized to pay the amount returnable to the outgoing tenant, upon the requisition of the commissioner, out of any funds available for such purpose.

"Which agreement shall entitle the purchaser to a land patent of the premises upon the due performance of its conditions.

"The commissioner shall have authority to fix any upset price for all such sales for cash or part credit and part cash.

"All such sales shall be held in Honolulu, or in the district where the land to be sold is situated. Any person designated by the commissioner may act as auctioneer at such sales without taking out an auctioneer's license.

"Provided, however, that land patents may be issued in exchange for deeds of private lands or by way of compromise upon the recommendation of the commissioner and with the approval of the governor without an auction sale, and further provided, that the governor may in his discretion upon such recommendation and approval, execute quit claim deeds for perfecting the titles of private lands where such titles are purely equitable or where such lands are suffering under defective titles, or in cases of claims to use of lands upon legal or equitable grounds."

Since by Sec. 75 of the Organic Act the superintendent of public works succeeds to the powers and duties of the minister of interior with reference to lands then under the control of the minister and as the commissioner of public lands succeeds to the powers and duties of the commissioners under the act of 1895, Sec. 252, R. L., declares that "The commissioner of public lands or superintendent of public works, as the case may be, by and with the authority of the governor, shall have power to lease, sell," etc. The power of the superintend-
41 ent of public works to exchange public for private lands under his control is without limitation as to the land to be given in exchange, the commissioner's power to exchange land under his control being such as is expressed in the proviso of

Sec. 276, R. L. The attorney general's contention that the commissioner has power to exchange under Sec. 254, R. L., cannot be sustained since Sec. 75 of the Organic Act, transferring to the superintendent the powers and duties of the minister of the interior, is not limited by Sec. 73. Pratt *v.* Holloway, 17 Haw. 537.

Sec. 276, R. L., authorizes the commissioner to sell unleased public land at public auction in parcels of not over 1000 acres for cash, and partly for credit in parcels of not over 600 acres for residence and cultivation, concluding with the proviso with reference to exchanges and compromises without auction sale and quitclaiming the government title in cases of defective titles or legal or equitable claims. The plaintiff insists that this authority for issuing patents in cases of exchange or compromise is confined to parcels of not over 1000 acres not under lease on the ground that it is only to such land and such parcels that the provisos refer. The decision of the case depends largely upon the meaning of the words "provided however." They may mean the same as "but nevertheless," or "but notwithstanding what is above expressed," or "but anything hereinbefore contained to the contrary notwithstanding," in either of which expressions "but" conveys no other meaning than "and," and the power to exchange expressed in the proviso, if regarded as an independent power, would refer to any public land under the commissioner's control. While the commissioner is authorized to sell public land (1) not under lease, (2) in parcels of not over 1000 acres, (3) at public auction and (4) for cash (or partly for credit in case of the 600 acre parcels to be used for residence or cultivation) he is authorized to issue land patents in exchange for deeds of private lands without public auction upon his recommendation and the governor's approval. The exercise of this power is not expressly limited to unleased or 1000 acre parcels. Such limitation, if intended, would appropriately be expressed by inserting after the word "exchange" the words "of parcels of not
42 over 1000 acres of unleased land." There are several reasons why such unexpressed limitations would not be implied. They obviously would be inapplicable to the cases of defective titles or legal or equitable land claims mentioned in the second proviso of the same paragraph as well as to cases of compromise mentioned in the first proviso. As the earlier act, Sec. 254, R. L., contains no limitation to unleased or 1000 acre parcels in cases of exchange, compromise, etc., it would be reasonable to expect that if such limitation were intended in the later act it would be expressed.

It is urged, however, and with truth, that the Land Act of 1895 was intended, as shown in its various provisions, as a homestead and settlement act, to furnish opportunities for small proprietors and that the withdrawal of public lands from purposes of the homestead act, although for other public purposes, lessens the important benefits to be derived from the act. Unquestionably the act ought to be construed, as far as reasonably is practicable, so as to promote and not obstruct its clearly expressed objects, but such considerations do not justify the court in supplementing the

act by provisions not therein expressed. Moreover, while the restriction of sales to auction sales of not over 1000 acre parcels not under lease might secure better prices, the restriction does not prevent the same person from becoming purchaser of any number of parcels. There would be no advantage to the public in dividing this Land on Lanai into parcels within the 100 acre limit and obtaining a surrender of the leases prior to an exchange. If the lands were thus divided and the leases cancelled it would be a matter of policy whether the parcels should be exchanged for other lands of equivalent value.

It is not averred that any of this land is agricultural land suitable for settlers or homestead purposes. None but experts could decide upon the possibility of obtaining water for bringing waste or pastoral land under cultivation. One who is not an expert may or may not think that water could be obtained by conserving the rainfall or well boring. Expert knowledge is required to determine whether as the leases terminate, if the lands should re-
43 main unleased, nature would probably replace the forest or a devastation from floods and high winds would continue. Whether it would be better to trust to obtaining appropriations to make the lands of use for cultivation or to lease them under conditions requiring lessees to reforest or, on the other hand, to utilize opportunities of obtaining by exchange valuable property for immediate public uses is a question which requires for its decision the exercise of excellent judgment and forethought.

Upon the plaintiff's contention, as we understand it, while public land to any required extent under the superintendent of public works may be exchanged for "parcels of land required for roads, sites of government buildings or other government purposes" (Sec. 254, R. L.), all lands under the control of the commissioner are intended by the Land Act of 1895 to be used or disposed of by him only as pointed out in the act and to permit the exchange of leased land, although worthless for settlement or homestead purposes, would violate the spirit and intent of the act. It must be observed, however, that Sec. 254, exempting exchanges of land from the necessity of public auction, merely recognizes the power to make them which is implied in the power given by Sec. 252 to dispose of public lands; but Sec. 276 does more than to recognize the commissioner's power of exchange, it declares affirmatively that the power can be exercised, and without the requirement of public auction, the terms used being as broad as those of Sec. 252. The homestead act of 1895, while restricting sales and leases of land, allowing sales only of land not under lease, and providing that leases shall not be renewed while having more than two years to run, leaves the matters of exchanges of land and of comprises of land claims to the discretion of the commissioner and governor.

In Oregon *v.* Hitchcock, 202 U. S. 60, decided April 23, 1906, the State of Oregon filed a bill to restrain the secretary of the interior and the commissioner of the general land office from patenting to any Ind-an or other person certain lands which, on March

12, 1860, were swamp and overflowed lands, the State of Oregon claiming the lands under an act of Congress of March 12,
44 1860. The objection was made by demurrer that as the legal title to the lands was in the United States the suit did not lie since the United States, being the real party in interest, could not be sued without its consent. The court, after citing from Minn. *v.* Hitchcock, 185 U. S. 373, as follows: "Now the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter," then said: "The legal title to all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the Land Department that the lands referred to were swamp or overflowed on March 12, 1860. Under those circumstances it is not a province of the courts to interfere with the Land Department in its administration. So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and, until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land Department. Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States."

If the proposed exchange should secure land suited for homesteads and settlement it would clearly promote the objects of the land act and yet would be based on the same law under which land would be acquired for other public uses. This fact lends force to the view that considerable undefined discretion is necessarily left to the commissioner and governor, the exercise of which discretion cannot be controlled by injunction.

The decree appealed from is reversed, the demurrer is sustained and bill dismissed.

(S'g'd) ALFRED S. HARTWELL.

G. D. Gear and A. G. M. Robertson for plaintiff.

E. C. Peters, Attorney General, and F. W. Milverton, Deputy Attorney General, for defendants.

45 *Concurring Opinion of Frear, C. J.*

I concur in the foregoing conclusions and will briefly state my views upon the main question only.

If the power exists to make the proposed exchange it must be under the law as set forth in section 252 or in section 276 of the Revised Laws.

I do not think the power exists under section 252. That section no doubt conferred the power until the passage of the com-

prehensive act of 1895 (R. L., Chap. 22), which inaugurated a new land policy and in its second section (R. L., Sec. 262), divided the public land into two classes, one designed mainly for purposes of settlement, the other devoted mainly to public uses, and placed the first class under the minister of the interior. From the passage of that act until the passage of the Organic Act of the Territory the powers conferred by section 252 could be exercised by the minister of the interior alone and with reference to lands of the second class alone. The Organic Act by section 75 transferred the powers and duties of the minister with reference to lands of the second class, including the powers and duties conferred by section 252, to the superintendent of public works, and by section 73 transferred the powers and duties of the commissioners of public lands as well as those of the minister of the interior as one of the commissioners to the commissioner of public lands. Pratt *v.* Halloway, 17 Haw. 539. The commissioner, therefore, does not now have the powers conferred by section 252 unless congress intended by section 73 of the Organic Act to give him additional powers not previously possessed by the commissioners or minister, namely, powers with reference to lands of the first class, which the minister, now superintendent, had and has with reference to lands of the second class under section 252. There evidently was no specific intention to do that. If it was done it was through the operation of the general provision of section 73 that "commissioner of public lands" should be substituted for "minister of the interior," but it is obvious that such substitution could not
46 be made consistently with the provisions of section 75 in every instance in the laws relating to public lands. Moreover, the powers of the commissioner of the kind now in question were already covered by section 276 of the Revised Laws. Section 252 also is by its terms made subject to such restrictions as may from time to time be provided by law, and the act of 1895 in its title and in section 86 (R. L., Sec. 344), purports to control that section (252). It is true that the commissioner of public lands is included with the superintendent of public works in section 252 as well as in several other sections of the same chapter. That chapter is of a general nature and at least some of its provisions apply to the commissioner as well as the superintendent, and both officers were included in section 252 as well as several other sections as a matter of caution, leaving the proper construction to the courts. And, although the Revised Laws were enacted to a certain extent by the legislature, it was beyond the power of the legislature, and it did not attempt (see L. 1905, Act 3, Sec. 2), to modify the laws relating to lands of the first class, although it has authority to modify those relating to lands of the second class. See Org. Act, Secs. 73, 75; also note to R. L., Ch. 20.

I think the power exists under section 276. That section provides that the commissioner with the consent of the governor may (1) sell public lands (2) not under lease (3) in parcels of not over 1000 acres (4) at public auction (5) for cash; also that

he may with such consent (1) sell public lands (2) not under lease (3) in parcels of not over 600 acres (4) at public auction (5) for part credit and part cash upon conditions of residence or improvement; that upon payment of the consideration or performance of the conditions a land patent shall be issued to the purchaser; and concludes with the following provisos:

"*Provided,* however, that land patents may be issued in exchange for deeds of private lands or by way of compromise upon the recommendation of the commissioner and with the approval of the governor without an auction sale, and further *provided,* that the governor may in his discretion upon such recommendation and approvel, execute quitclaim deeds for perfecting the titles of
47 private lands where such titles are purely equitable or where such lands are suffering under defective titles, or in cases of claims to use of lands upon legal or equitable grounds."

Do these provisos confer, as they purport to, general powers of exchange, compromise, etc., as distinguished from the restricted powers of sale conferred in the body of the section, or do they merely provide that such powers may be exercised without (1) a sale (4) at auction (5) for cash, which must be the case from their very nature, and must there be incorporated into them by implication the conditions that only lands (2) not under lease and (3) not over a specified area shall be subject to such powers?

Evidently the language of these provisos was suggested by or adapted from that of sections 252 and 254, which previously permitted the minister of the interior to transfer by way of exchange public lands of both classes, whether under lease or not and irrespective of area, and which, since the enactment of the act of 1895, which includes section 276, has conferred that power similarly unrestricted upon the minister, now the superintendent, as to lands of the second class. Apparently it was thought by the legislative body that the concurrence of the commissioners (now commissioner) and the executive council (now governor) under section 276 was a sufficient safeguard in cases of exchange of public lands of the first class just as the concurrence of the minister and executive council (now governor) formerly as to both classes and now the superintendent and governor as to the second class was and is deemed a sufficient safeguard under sections 252 and 254.

It is clear that the restrictions to lands not under lease and to parcels of not over the specified area cannot be implied in the second proviso, for not only is there no express exclusion of the restriction as to a sale at auction for cash from which the inclusion of the other restrictions might be implied, but the very nature of the powers conferred by that proviso, namely, to execute deeds for perfecting titles of private lands, excludes the idea of restrictions to lands not under lease or lands of not over a specified area; and if such re-
48 strictions cannot be implied in one proviso why should they be implied in the other, especially when it would have been easy and natural to have expressed them in that proviso if they had been intended.

If the words "without an auction sale" had been omitted from

the first proviso, there could be no question but that the restriction as to leases and areas could not properly be implied in that proviso, and yet those words add nothing to that proviso, for in that, as well as in the second proviso, the very nature of the transactions authorized is such as to exclude an auction sale, thus necessarily making the words "without an auction sale" redundant and suggesting that they were inserted without much thought or as a matter of course or with the same object for which section 254 was inserted, namely, to make clear, what would be the case without those words or without that section, that in the cases mentioned in these provisos and in that section no auction sale was required. This construction does not fail to give effect—and, too, the natural effect—to those words; the other construction gives them an unwarranted effect. Under either construction those words are surplusage from the very nature of the case so far as their direct meaning is concerned. To say that they were inserted for the ulterior purpose of showing that the restrictions as to leases and areas were intended to apply, would be to attribute to the legislature the selection of an obscure indirect method in preference to a plain direct method of accomplishing that purpose; it would be to read into the proviso two clauses of vast importance which would greatly limit the powers expressed and which the legislature did not even allude to in the provisos—merely in order that some special object might be found for the insertion of the words "without an auction sale." One construction does not expunge those words but allows them their natural effect; the other gives them an unnatural effect and makes them an excuse for adding other words to the provisos.

That these provisos were intended as grants of additional general powers and not mere modifications of powers conferred in the
49 body of the section, is further shown by the fact that they are powers of a different kind. The body of the section relates solely to sales and provides that sales be at public auction for cash or part credit and part cash and contains limitations as to the character and area of the lands that may be sold, while the provisos have nothing to do with sales, but, on the contrary, necessarily exclude, either expressly or by implication, all of the three requisites of a transfer under the body in the section, namely, (1) a sale (4) at public auction, and (5) for cash. The limitations, (2) and (3), as to what may be transferred, which were not expressed in the provisos, should not be implied to restrict transfers of a kind different from those upon which those limitations were expressly imposed in the body of the section.

The nature of the powers conferred in the first as well as in the second proviso would seem to exclude such limitations, for the powers given in that proviso must be constructed, in the absence of a manifested contrary intention, to be as large as the objects to be accomplished for which those powers were given. For instance, if a patent is to be issued by way of compromise the circumstances of the case might require a patent of lands under lease or of a parcel of over 1000 acres. Likewise, if the private lands which may be desired are of much value it might be impossible to obtain them by way of

exchange except by transferring a parcel of over 1000 acres or a parcel under lease. The object of the body of the section is to dispose of public lands, the payment of the consideration being incidental, while in the provisos the reverse is the case, the object being the acquisition of lands or the effecting of a compromise or perfecting of a title,—the issuance of a patent by way of exchange or otherwise being the incidental means of accomplishing the desired object.

The body of the act does not confer one power to which the provisos make exceptions, but confers two different powers similar in three features, namely, (1) sale, (2) not under lease, (4) at public auction, but differing in the other two features, namely, (3) in respect to the area, and (5) in respect to the terms of sale. If the provisos make exceptions merely in respect to three of these features, namely, 1, 4 and 5, (4 expressly; 1 and 5 by implication), which is conceded, and do not make exceptions as to 2 and 3, as contended, then, conceding that feature 2, which is the same in both powers conferred in the body of the section, presents no inherent difficulty, the question presents itself from which of these two powers feature 3 is to be taken for incorporation into the provisos, this feature differing under the two powers. Under one power the area is limited to 1000 acres, under the other to 600 acres. It would seem that if the legislature had intended either of these restrictions to be operative in the provisos it would have expressed that intention and would have specified which restrictions as to area was intended.

Thus from every consideration except that of the supposed dangerous extent and character of the powers conferred or that of the general spirit of the land act of 1895 as gathered from its other provisions, it would seem that the provisos confer independent grants of powers free from the restrictions imposed in the body of the section. It may be that these powers are dangerous in extent and character and may be exercised in such a way as to defeat to some extent other purposes of the act; and yet, as already shown, they are not more extensive and not of a character other than had previously existed beyond question as to both classes of public lands and now exist as to one class under sections 252 and 254; and they are not in themselves against the spirit of the land act as a whole, for the purposes of that act are various and include those of acquisition by exchange for public purposes as well as those of disposition by sale for settlement, and indeed the acquisition of lands in large tracts suitable for settlement in exchange for lands less suitable for settlement may be desired for the very purpose of disposition in small lots for settlement. Courts, however, cannot legislate or invade the provinces of the other departments of government in matters of policy. The extent to which power of the kind in question should be conferred upon executive officers is a question of policy for the legislative body; the exercise of the power in a particular case is a question of policy for the executive officers.

(S'g'd) W. F. FREAR.

51 *Dissenting Opinion of Wilder, J.*

I dissent from the majority on the main question involved in this case, which is, whether or not the commissioner of public lands with the approval of the governor has the power to exchange for private lands more than 1000 acres of public land under lease.

If that power exists, it is to be found in Sec. 276 of the Revised Laws, which, as originally enacted, was a part of the "Land Act of 1895." That section is as follows:

"The commissioner may with the consent of the governor sell public lands not under lease, in parcels of not over one thousand acres, at public auction for cash. Upon any such sale and the payment of the full consideration therefor, a land patent shall be issued to the purchaser.

"And he may, with such consent, sell public lands not under lease in parcels of not over six hundred acres, at public auction upon part credit and part cash, and deliver possession under an agreement of sale containing conditions of residence on or improvement of the premises sold, or of payment by instalments or otherwise of the purchase price, or all or any of such conditions.

"And in case of default in the performance of such conditions, the commissioner may, with or without legal process and without notice, demand or previous entry, take possession of the premises and thereby determine the estate created by such agreement. In case of such forfeiture, such land shall be sold at auction either as a whole or in parcels, for cash or on terms of time payments in the discretion of the commissioner; and if such sale shall result in an advance on the original price, the original purchaser shall receive therefrom the amounts of his payments to the government on account of purchase, without the interest and a pro rata share in such advance in proportion to the amounts of his payments. If such sale shall result, however, in a less price than the original, the amount returnable to him shall be charged with a pro rata amount of such decrease proportioned to the amounts of his payments. The treasurer is hereby authorized to pay the amount returnable to the outgoing tenant, upon the requisition of the commissioner, out of any funds available for such purpose.

52 "Which agreement shall entitle the purchaser to a land patent of the premises upon the due performance of its conditions.

"The commissioner shall have authority to fix any upset price for all such sales for cash or part credit and part cash.

"All such sales shall be held in Honolulu, or in the district where the land to be sold is situated. Any person designated by the commissioner may act as auctioneer at such sales without taking out an auctioneer's license.

"Provided, however, that land patents may be issued in exchange for deeds of private lands or by way of compromise upon the recommendation of the commissioner and with the approval of the governor without an auction sale, and further provided, that the governor

may in his discretion upon such recommendation and approval, execute quitclaim deeds for perfecting the titles of private lands where such titles are purely equitable or where such lands are suffering under defective titles, or in cases of claims to use of lands upon legal or equitable grounds."

Authority is thus given to the commissioner of public lands with the consent of the governor to sell public lands not under lease in parcels of not over 1000 acres at public auction. Upon fulfilling the conditions of the sale the purchaser becomes entitled to a land patent. The first proviso that "Provided, however, land patents may be issued in exchange for deeds of private lands * * * without an auction sale" has reference to what precedes, namely, land patents of not over 1000 acres. This is shown not only by the words "provided, however," which ordinarily and naturally refer to what precedes, but also by the use of the words "without an auction sale," thus implying that an auction sale was the only condition not a prerequisite to the issuance of a land patent in case of an exchange, leaving the other conditions prerequisite to the issuance of a land patent in force, namely, unleased public lands in parcels of not over 1000 acres. As to the natural meaning of a proviso see Cooper *v.* Island Realty Co., 16 Haw. 98; Lewis' Sutherland's Stat. Con. 352.

The second proviso in Sec. 276 has reference to quitclaim deeds and has nothing to do with land patents, and so obviously
53 no reference is made therein to any of the conditions prerequisite to the issuance of land patents imposed in the main body of the section.

If the intention was to allow a power of exchange not limited to quantity or kind of land, why were the words "without an auction sale" specifically inserted in the proviso as being the only prerequisite not necessary to the issuance of a land patent in case of an exchange? To construe the proviso as authorizing an unlimited power of exchange requires the practical elimination of the words "without an auction sale" and treating them as surplusage. That such a construction is not justified see Endlich Int. Stat. 23.

It is argued that there is no limit to the right to exchange mentioned in Sec. 276 either as to the amount or kind of land because there is no limit to the right of exchange mentioned in Sec. 254, R. L. That argument is not sound for the reason that at the time of the passage of Sec. 254 there was an absolute right to lease, sell or otherwise dispose of the public lands in any amount and whether leased or unleased, and also for the reason that the section which preceded and to which Sec. 254 had reference (Sec. 253, R. L.), imposed the one condition of a public auction sale in cases of transfers of government lands, and that one condition was expressly not to be imposed in cases of exchange.

The power contended for by the commissioner of public lands is undoubtedly contrary to the spirit of the Land Act of 1895, which included this section 276, and which requires dispositions of public lands to be in small areas, undoubtedly for the reason of encouraging settlers and homesteaders and also of allowing others than the very wealthy the privilege of acquiring portions of the public domain.

The majority recognizes that this exchange is contrary to the spirit of that act. In construing a doubtful provision of an act the act as a whole and its reason and spirit may be considered. See R. L., Sec. 12; *Ex Parte* Higashi, 17 Haw. 437. The course of legislation in these islands shows that the tendency has been to limit rather than to enlarge the power of disposing of public lands, and that was
54 recognized by Congress when it passed the Organic Act. How foolish it was to limit the amount and kind of public land which could be sold and at the same time to allow an unlimited power of exchange; and yet, according to the majority, that is exactly what the legislature of 1895 meant to do. If that is what the legislature meant, it is within the power of the commissioner of public lands and the governor to nullify the whole purpose and object of the Land Act of 1895 by exchanging all of the public domain under that act for, say, building sites in the city of Honolulu or other lands of equal or greater value, but unavailable and undesirable for the purposes of the act. If this exchange is permissible, any exchange is permissible. That the legislature intended to authorize any such power in view of the clear purposes and objects of the act, I cannot and do not believe.

If there is a power to exchange land under lease, what becomes of Sec. 279 of the Revised Laws, also a part of the Land Act of 1895, which by its terms purports to give to the commissioner of public lands the only power he has in regard to the disposition of land under a general lease? There is no conflict between Secs. 276 and 279 if the power of exchange is limited to lands not under lease, otherwise there is. Every construction which leads to a conflict between two sections in the same act should be avoided. Pratt *v.* Holloway, 17 Haw. 544. See also Bernier *v.* Bernier, 147 U. S. 246, where it is said that "It is a general rule, without exception, in construing statutes that effect must be given to all their provisions if such a construction is consistent with the general purpose of the act and the provisions are not necessarily conflicting. All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it. When the provision admits of more than one construction that one will be adopted which best serves to carry out the purposes of the act."

For the foregoing reasons it is my opinion that the decree appealed from should be affirmed.

(S'g'd) A. A. WILDER.

Endorsed: Filed February 1, 1907. J. A. Thompson, Clerk.

55 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

L. L. McCandless
v.
George R. Carter, Governor of the Territory, and James W. Pratt, Commissioner of Public Lands of the Territory.

Motion for Decree.

Argued February 13, 1907; Decided February 15, 1907.

Frear, C. J., Hartwell and Wilder, JJ.

Practice—*performing enjoined act after decision and before decree dismissing bill—continuing injunction for purposes of appeal after act performed.*—Although it is improper practice to perform an act temporarily enjoined immediately after the filing of a decision and before the entry of the decree dismissing a bill for an injunction, it would be useless to expressly continue the injunction after the performance of the act for the purposes of an appeal without first setting aside the transaction, and in this case it is deemed best to allow the present status to continue, subject to the action of the appellate court.

Opinion of the Court by Frear, C. J.

A decision having been filed on the 1st instant reversing the decree of the circuit judge appealed from, sustaining the demurrer to the bill, and dismissing the bill, but without in terms dissolving the injunction which had been granted by the circuit judge restraining the respondent Pratt from exchanging certain public lands for private lands, the complainant moved the court on the 13th instant to enter a decree in a form which followed the decision and also provided that the injunction should continue in force until further order of the court for the purpose of permitting an appeal to the supreme court of the United States. The attorney general, on behalf of the respondent Pratt, filed an objection to granting the motion, on the
56 ground that the complainant desired the decree merely for the purpose of appeal and that no appeal lies for the reasons that the record does not disclose that the amount involved exclusive of costs exceeds the value of $5000 and that no federal question is involved. He also stated orally that upon the rendition of the decision on the 1st instant the exchange had been made on his advice, but that he did not object to a continuance of the injunction on that account and that his only objection to the entry of the decree was that it was only for the purposes of appeal and that no appeal lies. The court expressed surprise that the attorney general had advised the completion of the exchange before the entry of the decree and stated that the question of the continuance of the injunction for the purposes of appeal, whether by the court or the justice allowing the ap-

peal, was one upon which he need not be heard as matter of right, and that, although he might be permitted to be heard as a matter of discretion, the court did not care to hear him under the circumstances, particularly in view of the fact that he, the natural one, as the successful party, to prepare and present a form of decree, had chosen not to do so but on the contrary to rely entirely upon the decision and had taken the position that no decree should or need be entered and had acted accordingly in advising the completion of the exchange before the entry of the decree, which, in the opinion of the court, was improper practice. The court, however, stated that the fact that the exchange had been made presented a more serious question, namely, whether the injunction should be continued in force when that which was sought to be enjoined had already been done, and called upon complainant's counsel to argue that question, which, after argument, the court took under consideration.

If the exchange had not been made the court would not hesitate to continue the injunction in force pending the proposed appeal, but while it might do no harm it would be useless and absurd to provide expressly in the decree for a continuance of an injunction against what has already been accomplished. It is true that the court has inherent power, as well as express power under the statute, to
57 protect its jurisdiction, and also that its opinions or decisions remain subject to its control until the settlement and entry of the final decree. In this case, for instance, if the transaction had been completed prior to the decision the court could have set it aside as well as treated the action as a contempt of court. Likewise, if of its own motion or on a motion for a rehearing or other motion it should set aside or modify the decision so as to produce a different result it could enforce that notwithstanding the consummation of the exchange. But the fact is that the decision was rendered before the exchange was made and has not since been altered. We do not now see our way clear to take steps to set aside the transaction solely for the purposes of appeal without altering the decision upon the merits of the case. It is best now to leave the matter as it stands for such action as the supreme court of the United States may direct in case an appeal or writ of error is allowed to that court and heard by it. If that court decides the case upon its merits and reverses this court it may be able to restore the former status, and if it does not hear the case upon its merits it may be that an original bill to set aside the transaction would lie, from the disposition of which an appeal or writ of error might be taken which could be heard upon its merits by that court, but those are questions for consideration when they arise.

A decree may be entered following the decision, omitting an order dissolving the injunction.

A. G. M. Robertson and G. D. Gear for complainant.

E. C. Peters, Attorney General, and F. W. Milverton, Deputy Attorney General, for respondent Pratt.

(S'g'd) W. F. FREAR.
" ALFRED S. HARTWELL.

Endorsed: Filed February 15, 1907, at 11 o'clock A. M. (Sgd.) J. A. Thompson, Clerk.

58 In the Supreme Court of the Territory of Hawaii.

L. L. McCandless, Complainant,
vs.
George R. Carter, Governor of the Territory of Hawaii, and Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, Respondents.

Decree.

The above entiled cause having come on for hearing and argument upon the Respondent James W. Pratt's appeal from the Interlocutory Decree of the Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, overruling the Respondent's Demurrer to Complainant's Bill of Complaint, counsel for the respective parties having been heard, and this Court having been fully informed in the premises, and it appearing to this Court that the Respondent's Demurrer, for the reasons stated in the opinion filed herein on the 1st day of February, A. D. 1907, should have been sustained, it is therefore ordered, adjudged and decreed that the Respondent's said Demurrer be sustained and the Complainant's said Bill of Complaint be dismissed with costs to be taxed by the Clerk of this Court.

Dated Honolulu, March 1, 1907.

By the Court:

[SEAL.] (S'g'd) J. A. THOMPSON, *Clerk.*

Endorsed: Filed March 1, 1907. (S'g'd) J. A. Thompson, Clerk.

59 In the Supreme Court of the Territory of Hawaii.

L. L. McCandless, Complainant,
vs.
George R. Carter, Governor of the Territory of Hawaii, and James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, Respondents.

Petition for Writ of Error.

United States of America, *Territory of Hawaii:*

To the Honorable the Chief Justice of the Supreme Court of the Territory of Hawaii:

The petition of L. L. McCandless respectfully shows that on the 1st day of March, A. D. 1907, the Supreme Court of the Territory of Hawaii rendered a final decree against your petitioner, in a certain cause wherein L. L. McCandless was complainant, and George R. Carter, Governor of the Territory of Hawaii, and James W. Pratt, Commissioner of the Public Lands of the Territory of Hawaii,

were defendants sustaining the demurrer of said James W. Pratt to the complaint of complainant and dismissing the said complainant's Bill of Complaint, and for costs, as will appear by reference to the record and proceedings in said cause; and that said court is the highest court of the Territory of Hawaii in which a decision in said suit could be had.

And your petitioner claims the right to remove said decree
60 to the Supreme Court of the United States by Writ of Error, under Section 709 of the Revised Statutes of the United States and the Organic Act of the Territory of Hawaii, because of the reasons set forth in the assignment of errors which is filed herewith, and hereby referred to and *is* appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your Petitioner prays the allowance of a Writ of Error Returnable into the Supreme Court of the United States and for citation, and your Petitioner will ever pray.

(S'g'd) L. L. McCANDLESS, *Petitioner,*
By A. G. M. ROBERTSON,
Attorney for Petitioner.

Let the Writ of Error issue as prayed.
Dated, Honolulu, T. H., June 6, 1907.
(S'g'd) M. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed: Filed June 6, 1907 at 10:58 o'clock A. M. (S'g'd) Henry Smith Clerk Supreme Court, Territory of Hawaii.

61 In the Supreme Court of the Territory of Hawaii.

L. L. McCANDLESS, Complainant,
vs.
GEORGE R. CARTER, Governor of the Territory of Hawaii, Defendant, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii, Defendant and Respondent.

Bond.

Know all men by these presents, that we, L. L. McCandless, as principal, and A. Herbert and P. H. Burnette as sureties, are held and firmly bound unto James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, and his successors in office, in the sum of one thousand ($1000.00) dollars to be paid to said obligee his successors representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 29th day of April A. D. 1907.

Whereas the above named complainant hath *presecuted* a Writ of Error in the Supreme Court of the United States to reverse a de-

cree rendered in the above entitled action, by the Supreme Court of the Territory of Hawaii.

Now therefore the condition of this obligation is such that if the above named complainant shall prosecute his said Writ of Error to effect, and answer all costs and damages if he shall fail to
62 make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

(S'g'd) L. L. McCANDLESS, *Principal.*
" A. HERBERT, *Surety.*
" P. H. BURNETTE, *Surety.*

TERRITORY OF HAWAII, *County of Oahu, ss:*

On this 29th day of April, A. D. 1907, personally appeared before me L. L. McCandless, A. Herbert and P. H. Burnette, known to me to be the persons described in and who executed the foregoing instrument, who acknowledged to me severally that they executed the same freely and voluntarily and for the uses and purposes therein set forth.

[SEAL.] (S'g'd) F. F. FERNANDES,
Notary Public in and for the First Judicial Circuit, T. H.

Endorsed: Filed June 6, 1907 at 10:58 o'clock A. M. (S'g'd) Henry Smith Clerk Supreme Court, Territory of Hawaii.

63 In the Supreme Court of the United States of America.

L. L. McCANDLESS, Plaintiff in Error,
vs.
GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAS. W. PRATT, Commissioner of Public Lands of the Territory of Hawaii, Defendants in Error.

In Error to the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes the Plaintiff in Error in the above entitled cause and says that in the Record of the Proceedings in said cause in the Supreme Court of the Territory of Hawaii, there is manifest error in this, to wit:

1. That the Supreme Court of the Territory of Hawaii erred in not ordering the injunction in this suit to be continued in force as to the defendant-in-error, George R. Carter, Governor of the Territory of Hawaii; and in not decreeing that the order of the First Judge of the Circuit Court of the First Circuit, Territory of Hawaii, dissolving said injunction and dismissing the Bill in this suit as to

the said defendant-in-error, George R. Carter, be reversed and held for naught.

64 2. That the Supreme Court of the Territory of Hawaii erred in reversing the decree of the said First Judge, appealed from, in sustaining the demurrer of the defendant-in-error, Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, to the Bill in this suit, and in dismissing said Bill.

3. That the Supreme Court of the Territory of Hawaii erred in not decreeing that the plaintiff-in-error being a property owner and taxpayer in the Territory of Hawaii and a citizen thereof, was entitled to the injunctions prayed for in this suit because the threatened acts of the defendants-in-error sought to be enjoined, were unlawful and without legal justification or validity, whether he showed said acts would result in pecuniary injury to himself or not.

4. That the Supreme Court of the Territory of Hawaii erred in reversing the decision of the said Circuit Judge, appealed from that the defendant-in-error, Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, with the consent of the defendant-in-error, George R. Carter, Governor of the Territory of Hawaii, had not authority of law to exchange the lands described in the Bill in this suit, in parcels of more than 1000 acres each in the manner set forth in said Bill, and to exchange said lands in the manner set forth in said Bill, said lands being leased as set forth in said Bill; and that said Supreme Court of the Territory of Hawaii erred in deciding that the defendant-in-error, Jas. W. Pratt, Commissioner of Public Lands for the Territory of Hawaii, with the consent of the defendant-in-error, George R. Carter, Governor of the Terrritoy of Hawaii, had authority of law to exchange said lands in

65 parcels of more than 1000 acres each in the manner set forth in said Bill, and to exchange said lands in the manner set forth in said Bill, said lands being leased as set forth in said Bill.

5. That when the Supreme Court of the Territory of Hawaii was informed by counsel for the defendants-in-error that the exchange of lands sought to be enjoined by the Bill in this suit, and enjoined in this suit, had been made, it erred in not decreeing that the said exchange of lands should be cancelled and set aside and in not ordering the reconveyance of said lands so exchanged.

6. That the Supreme Court of the Territory of Hawaii erred in not granting the motion of the plaintiff-in-error made on the 13th day of February, 1907, to continue the injunction made by the Circuit Judge in this suit until such time as the decision of the said Supreme Court of the Territory of Hawaii in this suit could be reviewed by the Supreme Court of the United States, and that the said Supreme Court of the Territory of Hawaii erred in not decreeing and ordering that the said injunction made by the Circuit Judge in this suit should continue in force until such time as its decisions herein could be reviewed by the Supreme Court of the United States.

And the plaintiff-in-error further says: That the Supreme Court of the Territory of Hawaii is the highest Court of the Territory of Hawaii in which a decision in said cause could be had; and that all the said errors in the decisions of the said Supreme Court of the Ter-

ritory of Hawaii in said cause hereinbefore alleged, are against the rights, privileges and immunities of the plaintiff-in-error as
66 set forth in the statutes of the United States of America in "An Act to Provide a Government for the Territory of Hawaii," and in Section 73 of said Act.

Wherefore the plaintiff-in-error prays:

That the Decree of the Supreme Court of the Territory of Hawaii made in this suit on the 1st day of March, 1907, be reversed; that the Order of the Circuit Judge in this suit dissolving the Temporary Injunction and dismissing the Bill in this suit as to George R. Carter, Governor of the Territory of Hawaii, be reversed and held for naught; that the Decree of the Circuit Judge overruling the Demurrer in this suit of the defendant in error, Jas. W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, be sustained, and that said Demurrer be overruled.

That it may be further ordered and decreed, that the Exchange of Lands, as set forth in the Bill in this suit, is null and void and without authority or validity of law; and that the parties to said exchange reconvey said lands and execute quit-claim deeds each to the other, or others, as the case may be, of all right, title or interest they, or either of them, may have obtained from such other, or others, by reason or virtue of said Exchange; or that this cause be remanded to the said Supreme Court of the Territory of Hawaii for such further or other proceedings as to this Court may appear meet and proper in the premises and as the nature of the circumstances of this suit may require.

That it may be decreed he shall have such further or other relief in the premises as the nature of the circumstances of this suit may require and to this Court shall seeem meet and proper.

(S'g'd) A. G. M. ROBERTSON,
Counsel for the Plaintiff in Error.

Honolulu, T. H., June 6th, 1907.

67 Endorsed: Filed June 6, 1907 at 10.58 O'clock A. M. (S'g'd) Henry Smith Clerk, Supreme Court, Territory of Hawaii.

[Endorsed:] Supreme Court, Territory of Hawaii. L. L. McCandless, Plaintiff-in-Error, *v.* George R. Carter, *et al.*, Defendants-in-Error. Assignment of Errors.

68 In the Supreme Court of the Territory of Hawaii.

L. L. McCANDLESS, Plaintiff in Error,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii, Defendants in Error.

Præcipe of Transcript.

To Henry Smith, Clerk of this Honorable Court:

You are requested to make a transcript of the record in the said Court of the above entitled suit to be filed in the Supreme Court of the United States pursuant to a Writ of Error allowed in said suit and to include in such transcript of record the following and no other papers, to wit:

1. Bill in Equity for Injunction.
2. Temporary Injunction.
3. Chamber Summons.
4. Motion to Dissolve Injunction and Dismiss Bill as to George R. Carter.
5. Clerk's Minutes.
6. Demurrer to Bill.
7. Opinion of Circuit Judge.
8. Interlocutory Decree Overruling Demurrer to Bill.
9. Bond on Appeal to the Supreme Court of the Territory of Hawaii.
10. Notice of Appeal and Appeal.

69 11. Opinion of the Supreme Court of the Territory of Hawaii, decided February 1, 1907.

12. Opinion of the Supreme Court of the Territory of Hawaii, decided February 15, 1907.
13. Decree of the Supreme Court of the Territory of Hawaii, entered March 1, 1907.
14. Petition for Writ of Error to the Supreme Court of the Territory of Hawaii.
15. Bond on Writ of Error.
16. Asignment of Errors.
17. Præcipe of Transcript.

Said Transcript to be prepared as required by law and the rules of this Court and of the Supreme Court of the United States of America.

(S'g'd) A. G. M. ROBERTSON,
Counsel for Plaintiff in Error.

Endorsed: Filed June 6, 1907 at 3 O'clock P. M. (S'g'd) Henry Smith Clerk, Supreme Court, Territory of Hawaii.

Endorsed on cover: File No. 20,764. Hawaii Territory supreme court. Term No. 361. L. L. McCandless, plaintiff in error, *vs.* George R. Carter, Governor of the Territory of Hawaii, and James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii. Filed June 20, 1907. File No. 20,764.

In the Supreme Court of the United States of America.

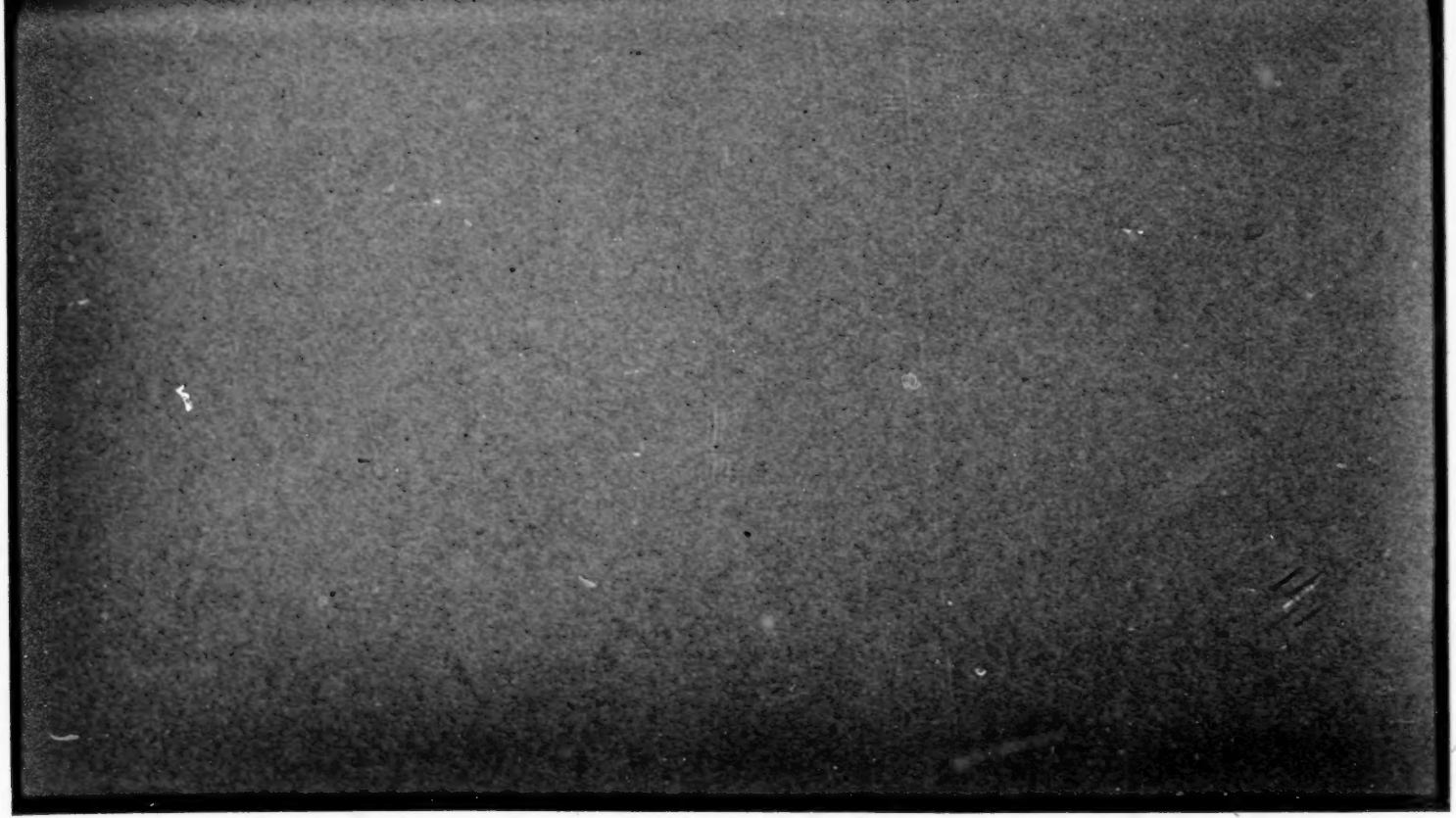
OCTOBER TERM, 1907.

No. [redacted] 109.

L. L. McCANDLESS,
Plaintiff in Error,
vs.
GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

Error to the Supreme Court of Hawaii.

MOTION OF W. S. FREAR, GOVERNOR OF HAWAII, TO DISMISS WRIT OF ERROR.



In the Supreme Court of the United States of America.

OCTOBER TERM, 1907.

No. 361.

L. L. McCANDLESS,
Plaintiff in Error,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

STIPULATION.

It is hereby stipulated by and between the parties herein, by their respective counsel, that any motion or motions to dismiss the Writ of Error herein may stand submitted by consent from and after the sixteenth day of December, 1907, copy or copies of such motion or motions and briefs of the moving parties being served upon counsel for plaintiff in error not later than the 31st day of October, 1907.

Dated at Honolulu, October 30th, 1907.

L. L. McCANDLESS, Plaintiff in Error,
By (Sgn.) A. G. M. ROBERTSON,
His Attorney.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii, Defendants in error,
By (Sgn.) C. R. HEMENWAY, Attorney General, and
By (Sgn.) CHARLES F. CLEMONS,
Their Attorneys.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

L. L. McCANDLESS,
Plaintiff in Error,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

MOTION TO DISMISS WRIT OF ERROR.

Comes now Walter F. Frear, Governor of the Territory of Hawaii, and successor as governor to George R. Carter, named above as one of the defendants in error, and moves to dismiss the Writ of Error, heretofore and on the 6th day of June, in the Year of Our Lord One Thousand Nine Hundred and Seven, issued to the Supreme Court of the Territory of Hawaii, upon the following grounds, to wit:

I.

That this Court has no jurisdiction of him, the said Walter F. Frear, Governor of the Territory of Hawaii, because the injunction heretofore and on the 14th day of December, 1906, issued against the then Governor of the Territory of Hawaii was on the 28th day of December, 1906, dissolved and the bill herein as to said Governor dismissed by the Circuit Judge of the First Judicial Circuit of the Territory of Hawaii, from which order and decree no appeal or writ of error was taken to the Supreme Court of Hawaii.

II.

That this Court has no jurisdiction of him, the said Walter F. Frear, Governor of the Territory of Hawaii, because no final decree or judgment affecting the Governor of Hawaii has been rendered herein in the highest court of the Territory of Hawaii in which a decision could be had.

This motion is based upon the record herein and the affidavit of Charles R. Hemenway, Attorney General of Hawaii, hereto attached and made a part hereof.

Dated at Honolulu, October 31st, 1907.

WALTER F. FREAR,
Governor of Hawaii,

By (Sgn.) C. R. HEMENWAY,
Attorney General of Hawaii,

(Sgn.) HENRY E. COOPER,
(Sgn.) CHARLES F. CLEMONS,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

L. L. McCANDLESS,
Plaintiff in Error,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

United States of America,
Territory of Hawaii,
Island and County of Oahu. } ss.

Charles R. Hemenway, being duly sworn, deposes and says: That on the 15th day of August, 1907, he was duly appointed Attorney General of Hawaii, qualified as such, and has been ever since, and is now, the duly qualified and acting Attorney General; that on the 28th day of June, 1907, Walter F. Frear was appointed as Governor of Hawaii in the place of George R. Carter, resigned; that on the 15th day of August, 1907, the said Walter F. Frear duly qualified as said Governor and has been ever since, and is now, the Governor of Hawaii.

And further deponent sayeth not.

(Sgd.) CHARLES R. HEMENWAY.

Subscribed and sworn to before me this 31st day of October, 1907.

[Seal] (Sgd.) JNO. M. KEA,
Notary Public First Judicial Circuit, Territory of Hawaii.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

L. L. McCANDLESS,

Plaintiff in Error,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,

Defendants in Error.

Service of a copy of the foregoing Motion, Affidavit and Brief is hereby admitted this 31st day of October, A. D. 1907.

(Sgn.) A. G. M. ROBERTSON,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
DEC 5 1907
JAMES H. McKENNEY,

In the Supreme Court of the United States of America

OCTOBER TERM, 1907.

No. [redacted]109.

L. L. McCANDLESS,
Plaintiff in Error,
vs.
GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

ERROR TO THE SUPREME COURT OF HAWAII.

BRIEF OF W. F. FREAR, GOVERNOR OF HAWAII, ON MOTION TO DISMISS WRIT OF ERROR.

(20,764)

IN THE SUPREME COURT OF THE UNITED STATES
OF AMERICA.

L. L. McCANDLESS,
Plaintiff in Error,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

BRIEF ON MOTION TO DISMISS.

STATEMENT OF CASE.

This was a bill to obtain an injunction restraining the governor and the commissioner of public lands from exchanging for private lands certain public lands on the Island of Lanai having an area of 47,669 acres of which all but 1000 acres are held by one Charles Gay under five leases terminating respectively February 9, 1907, of 7400 acres; November 1, 1907, of 7900 acres; June 23, 1908, of 9000 acres; January 1, 1916, including the lands of Kamoku, area 8291 acres, and Poomai, area 9078 acres; and January 2, 1925, of 5000 acres, the total annual rentals being $1600. (Tr. p. 4.)

The bill avers that the commissioner threatens to and will exchange said public lands for other lands equal in value and that the governor threatens to and will approve of the exchange unless restrained and enjoined from so doing; that the governor caused the following notice to be published in the daily newspapers:

> "Lanai Lands. Notice is hereby given that having decided an Exchange of the Public Lands on the Island of Lanai to be advisable, the Commissioner of Public Lands is prepared to receive offers of other lands that are equal in value of those of Lanai, *and of greater immediate service* to the Territorial Government, from any responsible person, up to and in-

cluding Saturday, the fifteenth day of December, 1906. G. R. Carter, Governor. Executive Building, Honolulu, November 28, 1906;" (Tr. p. 5);

that the commissioner has no right or authority to exchange these lands for other lands of equal value or for any other lands and that the governor has no right or authority to approve of the exchange which is not by way of compromise or equitable settlements of rights of claimants, nor by way of exchange for parcels of land required for roads, nor for sites of government buildings, nor for any other government purposes; (Tr. p. 5); that the lands are of great value, the said land of Kamoku, containing about 8000 acres of good grazing land with about three miles of sea frontage with a good harbor, the land extending inland about six miles, having a value of $40,000; that the said land of Poomai is good grazing land having about five and one-half miles of sea frontage, including a fair harbor or landing, and extending inland over six miles, having a value of $37,000; that each of the other lands is worth more than $5000. (Tr. p. 6.)

The averments made upon information and belief are that the commissioner threatens to make the exchange mentioned and those which relate to the value and condition of the lands. The jurat is in the usual form—that the plaintiff has read the complaint and knows its contents and that "the same are true, except as to those matters therein stated on information and belief, and as to those he believes it to be true." (Tr. pp. 6 and 7.)

Ex parte injunctions were issued upon the filing of the bill, (Tr. p. 8), but, on defendant Carter's motion, (Tr. p. 10), the injunction against him as governor was dissolved and the bill as to him dismissed on December 28, 1906, (Tr. p. 13), from which order no appeal was taken by plaintiff. (Tr. p. 13.) The commissioner's demurrer to the bill was overruled and his appeal from the decree overruling the demurrer was allowed. (Tr. pp. 19 and 20.) The demurrer raises the points (1) that the bill is insufficiently verified; (2) that the averments that the exchange is not authorized by law and that the commissioner ought to be enjoined state conclusions of law; (3) that the plaintiff has not shown any interest which entitles him to an injunction; (4) that the bill does not show that the commissioner is about to do any act in violation of law. (Tr. pp. 11 and 12.)

The Supreme Court of the Territory, on February 1, 1907, reversed the decree appealed from, sustained the demurrer of

the defendant in error Pratt upon the fourth ground stated, and dismissed the bill. (Tr. pp. 22-35.) Thereafter and on February 1, 1907, the exchange now sought to be enjoined was consummated. (Affi. J. W. Pratt.)

Plaintiff in error subsequently and on February 13, 1907, moved in the Supreme Court of Hawaii for the entry of a decree in accordance with the decision rendered by that court and containing a provision that the bill should be retained and the preliminary injunction be continued in force for the purpose of permitting an appeal to the Supreme Court of the United States. The Supreme Court, in deciding this motion, on February 15, 1907, (Tr. pp. 36-38), permitted the entry of a decree following their decision upon the merits, but refused to continue the injunction in force because the exchange of the lands sought to be prevented by plaintiff in error had been already made, subsequent to the decision of the Supreme Court and prior to the filing of plaintiff in error's motion.

Thereafter, and on June 6, 1907, a writ of error was allowed, (Tr. pp. 1 and 2), based upon various assignments of alleged error by the Supreme Court of Hawaii, which are claimed to be against the rights, privileges and immunities of plaintiff in error, as set forth in the statutes of the United States, to wit, in Section 73 of "An Act to Provide a Government for the Territory of Hawaii." (Tr. pp. 40-42.) Defendant in error now moves to dismiss the writ upon the grounds set forth in his motion on file.

ARGUMENT.

The statement of the case above, and the record herein show that on December 24, 1906, a motion to dissolve the injunction and to dismiss the bill as to George R. Carter, Governor of the Territory of Hawaii, was made before the First Circuit Judge of the First Judicial Circuit. (Tr. pp. 10 and 11.) This motion was granted on December 28, 1906. (Tr. p. 13.) From this order of the Circuit Judge no appeal was noted or perfected by complainant L. L. McCandless, nor was any writ of error sued out of the Supreme Court of Hawaii, but the case proceeded with James W. Pratt, Commissioner of Public Lands, as the sole respondent. From the decree overruling his demurrer, an appeal was taken, (Tr. p. 20), and on such appeal the Supreme Court of Hawaii rendered its decision reversing said decree, dissolving the injunction and dismissing the bill. (Tr. pp. 22-35.) The Governor of Hawaii was not then a party to the suit, nor was he before the Supreme Court of Hawaii, the

highest court in this Territory, in which a decision could be had.

Subsequently this writ of error was sued out, naming the Governor as a defendant and citation issued directing him to appear. (Tr. pp. 1 and 2.) In obedience thereto the present Governor now submits that the writ should be dismissed as to him because this Court lacks jurisdiction over him, on account of the failure of plaintiff in error to obtain from the highest court of this Territory a final or any decree on appeal from the order of the Circuit Judge dismissing the bill and dissolving the injunction so far as the same affected the then Governor.

Section 1859 of the Revised Laws of Hawaii provides:

> "Sec. 1859. From Circuit Judges in Chambers: Bond. Appeals shall be allowed from all decisions, judgments, orders or decrees of circuit judges in chambers, to the supreme court, except in cases in which the appellant is entitled to appeal to a jury, whenever the party appealing shall file notice of his appeal within five days, and shall pay the costs accrued, and deposit a sufficient bond in the sum of fifty dollars, conditioned for the payment of the costs further to accrue in case he is defeated in the appellate court, or money to the same amount, within ten days after the filing of the decision, judgment, order or decree appealed from; * * *."

Having failed to comply with the requirements of this section, plaintiff's only means of securing a reversal of this order would have been to sue out a writ of error in the Supreme Court of Hawaii.

Section 1869 of the Revised Laws of Hawaii provides:

> "Sec. 1869. Had When. A writ of error may be had by any party deeming himself aggrieved by the decision of any justice, judge or magistrate, or by the decision of any court except the supreme court, or by the verdict of a jury, at any time before the execution thereon is fully satisfied, within six months from the rendition of judgment."

Plaintiff in error, however, took neither of these courses, but after the decision of the Supreme Court of Hawaii on respondent Pratt's appeal, secured this writ of error directed to the

Supreme Court of Hawaii, under which he is now attempting to have the decision and decree of such court reversed, and the injunction made perpetual against a party not before such court.

It is submitted that plaintiff in error having failed to secure, as he might have done, the final judgment or decree of the highest court of Hawaii in which a decision might be had, upon the dismissal of the bill as to the then Governor, this writ should now be dismissed as to the present Governor.

Respectfully submitted,

Honolulu, Hawaii, October 31st, 1907.

(Sgn.) C. R. HEMENWAY,
Attorney General of Hawaii.

(Sgn.) WM. L. WHITNEY,
1st Deputy Attorney General of Hawaii.

(Sgn.) CHARLES F. CLEMONS,
(Sgn.) HENRY E. COOPER,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

L. L. McCANDLESS,
Plaintiff in Error,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

Service of a copy of the foregoing Motion, Affidavit and Brief is hereby admitted this 31st day of October, A. D. 1907.

(Sgn.) A. G. M. ROBERTSON,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
DEC 5 1907
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States of America.

OCTOBER TERM, 1907.

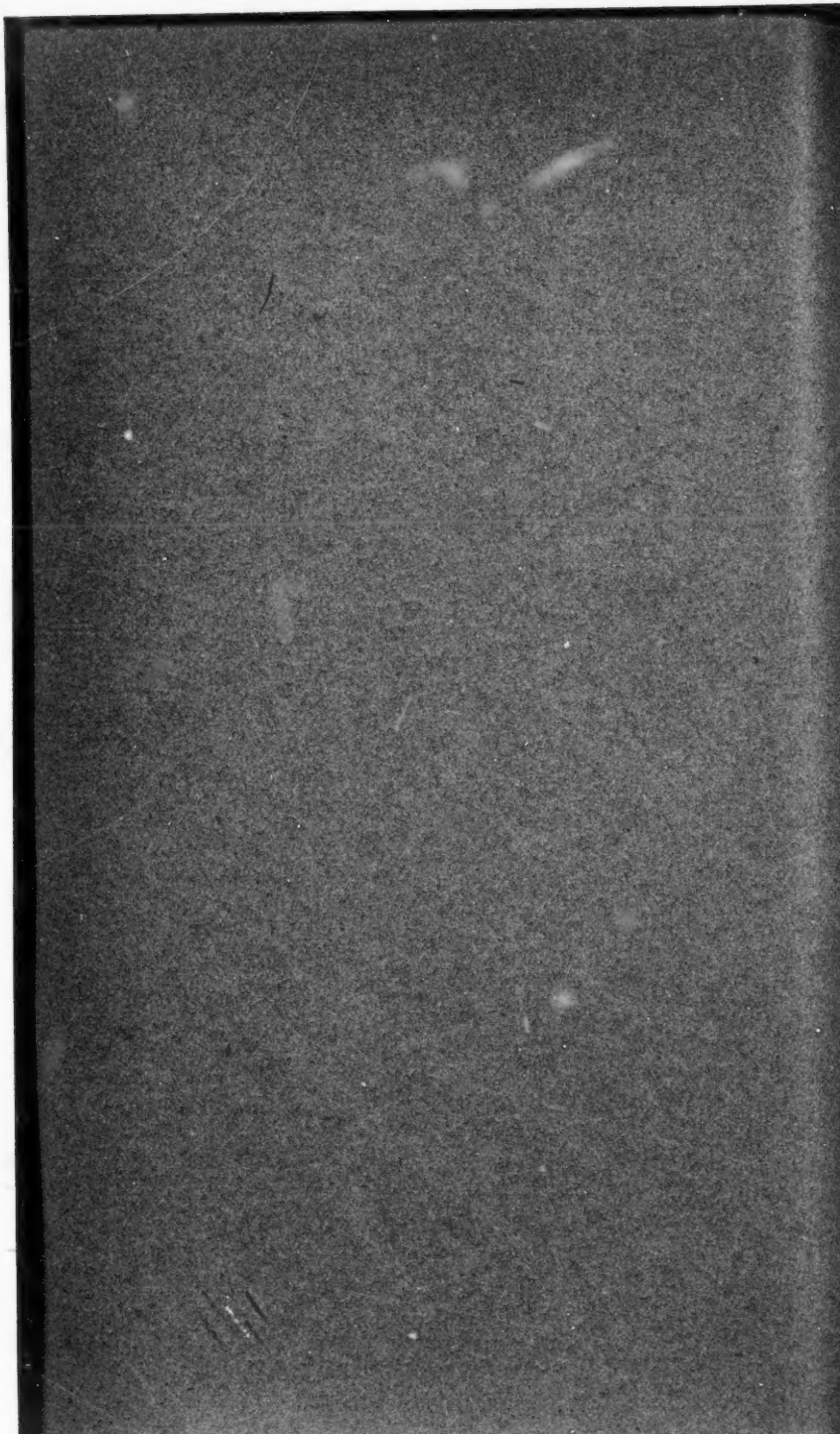
No. [redacted]109.

L. L. McCANDLESS,
Plaintiff in Error,
vs.
GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

ERROR TO THE SUPREME COURT OF HAWAII.

MOTION OF JAMES W. PRATT, COMMISSIONER OF PUBLIC LANDS OF HAWAII TO DISMISS WRIT OF ERROR.

(20,704)



In the Supreme Court of the United States of America.

OCTOBER TERM, 1907.

No. 361.

L. L. McCANDLESS,
Plaintiff in Error,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

STIPULATION.

It is hereby stipulated by and between the parties herein, by their respective counsel, that any motion or motions to dismiss the Writ of Error herein may stand submitted by consent from and after the sixteenth day of December, 1907, copy or copies of such motion or motions and briefs of the moving parties being served upon counsel for plaintiff in error not later than the 31st day of October, 1907.

Dated at Honolulu, October 30th, 1907.

L. L. McCANDLESS, Plaintiff in Error,
By (Sgn.) A. G. M. ROBERTSON,
His Attorney.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii, Defendants in Error,
By (Sgn.) C. R. HEMENWAY,
By (Sgn.) CHARLES F. CLEMONS,
Their Attorneys.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

L. L. McCANDLESS,
Plaintiff in Error,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

MOTION TO DISMISS WRIT OF ERROR.

Comes now the respondent James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, by his counsel, and moves to dismiss the Writ of Error heretofore and on the 6th day of June, in the Year of Our Lord One Thousand Nine Hundred and Seven, issued to the Supreme Court of the Territory of Hawaii, upon the following grounds, to wit:

I.

That this Court has no jurisdiction in this cause because:

(a) No federal question involving the validity of any treaty or statute of the United States, or the validity of any statute of the Territory of Hawaii, or the validity of any authority exercised under the United States or the Territory of Hawaii, is presented herein;

(b) Nor has any right, title, privilege or immunity given plaintiff under the constitution, treaties, or laws of the United States, been denied him;

(c) Nor is the sum or value of Five Thousand Dollars ($5000) involved herein.

II.

That the plaintiff in error has no standing in this Court because the record shows that he has no interest in the controversy, and further shows that no injury pecuniary or otherwise, direct or indirect, has been caused him.

III.

That this Court cannot grant the relief asked for in this proceeding, or any relief, because the act, against the doing of which an injunction was herein sought, has been already performed.

This motion is based upon the record herein and upon the affidavit of said James W. Pratt, Commissioner of Public Lands of the Territory of Hawaii, hereto attached and made a part hereof.

Dated at Honolulu, October 31st, 1907.

JAMES W. PRATT,
Commissioner of Public Lands.

By (Sgn.) C. R. HEMENWAY,
Attorney General of Hawaii.

(Sgn.) HENRY E. COOPER,
(Sgn.) CHARLES F. CLEMONS,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

L. L. McCANDLESS,
Plaintiff in Error,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

United States of America,
Territory of Hawaii,
Island and County of Oahu. } ss.

James W. Pratt, being duly sworn, deposes and says: That on the first day of December, 1903, he was duly appointed as Commissioner of Public Lands of the Territory of Hawaii, qualified as such commissioner, and has been since said day, and now is, the duly qualified and acting commissioner; that he is one of the defendants in error named above; that on the first day of February, 1907, subsequent to the decision of the Supreme Court of Hawaii reversing the decree of the Circuit Judge in the above entitled case, dissolving the injunction theretofore outstanding and dismissing the bill, deponent consummated the exchange of certain lands on the Island of Lanai, Territory of Hawaii, for certain other lands, which exchange, prior to said decision of the Supreme Court of Hawaii, had been enjoined.

And further deponent sayeth not.

(Sgn.) JAMES W. PRATT.

Subscribed and sworn to before me this 31st day of October, 1907.

(Sgn.) H. P. O'SULLIVAN,
[Seal] Notary Public First Judicial Circuit, Territory of Hawaii.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

L. L. McCANDLESS,
Plaintiff in Error,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

Service of a copy of the foregoing Motion, Affidavit and Brief is hereby admitted this 31st day of October, A. D. 1907.

(Sgn.) A. G. M. ROBERTSON,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States of America,

OCTOBER TERM, 1907.

No. 109.

L. L. McCANDLESS,
Plaintiff in Error,
vs.
GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

ERROR TO THE SUPREME COURT OF HAWAII.

BRIEF OF JAMES W. PRATT, COMMISSIONER OF PUBLIC LANDS OF HAWAII, ON MOTION TO DISMISS WRIT OF ERROR.

(20,764)

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

L. L. McCANDLESS,
Plaintiff in Error,

vs.

GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

BRIEF ON MOTION TO DISMISS.

STATEMENT OF CASE.

This was a bill to obtain an injunction restraining the governor and the commissioner of public lands from exchanging for private lands certain public lands on the Island of Lanai having an area of 47,669 acres of which all but 1000 acres are held by one Charles Gay under five leases terminating respectively February 9, 1907, of 7400 acres; November 1, 1907, of 7900 acres; June 23, 1908, of 9000 acres; January 1, 1916, including the lands of Kamoku, area 8291 acres, and Poomai, area 9078 acres; and January 2, 1925, of 5000 acres, the total annual rentals being $1600. (Tr. p. 4.)

The bill avers that the commissioner threatens to and will exchange said public lands for other lands equal in value and that the governor threatens to and will approve of the exchange unless restrained and enjoined from so doing; that the governor caused the following notice to be published in the daily newspapers:

> "Lanai Lands. Notice is hereby given that having decided an Exchange of the Public Lands on the Island of Lanai to be advisable, the Commissioner of Public Lands is prepared to receive offers of other lands that are equal in value of those of Lanai, *and of greater immediate service* to the Territorial Government, from any responsible person, up to and including Saturday, the fifteenth day of December, 1906. G. R. Carter, Governor. Executive Building, Honolulu, November 28, 1906;" (Tr. p. 5);

that the commissioner has no right or authority to exchange these lands for other lands of equal value or for any other lands and that the governor has no right or authority to approve of the exchange which is not by way of compromise or equitable settlements of rights of claimants, nor by way of exchange for parcels of land required for roads, nor for sites of government buildings, nor for any other government purposes; (Tr. p. 5); that the lands are of great value, the said land of Kamoku, containing about 8000 acres of good grazing land with about three miles of sea frontage with a good harbor, the land extending inland about six miles, having a value of $40,000; that the said land of Poomai is good grazing land having about five and one-half miles of sea frontage, including a fair harbor or landing, and extending inland over six miles, having a value of $37,000; that each of the other lands is worth more than $5000. (Tr. p. 6.)

The averments made upon information and belief are that the commissioner threatens to make the exchange mentioned and those which relate to the value and condition of the lands. The jurat is in the usual form—that the plaintiff has read the complaint and knows its contents and that "the same are true, except as to those matters therein stated on information and belief, and as to those he believes it to be true." (Tr. pp. 6 and 7.)

Ex parte injunctions were issued upon the filing of the bill, (Tr. p. 8), but, on defendant Carter's motion, (Tr. p. 10), the injunction against him as governor was dissolved and the bill as to him dismissed on December 28, 1906, (Tr. p. 13), from which order no appeal was taken by plaintiff. (Tr. p. 13.) The commissioner's demurrer to the bill was overruled and his appeal from the decree overruling the demurrer was allowed. (Tr. pp. 19 and 20.) The demurrer raises the points (1) that the bill is insufficiently verified; (2) that the averments that the exchange is not authorized by law and that the commissioner ought to be enjoined state conclusions of law; (3) that the plaintiff has not shown any interest which entitles him to an injunction; (4) that the bill does not show that the commissioner is about to do any act in violation of law. (Tr. pp. 11 and 12.)

The Supreme Court of the Territory, on February 1, 1907, reversed the decree appealed from, sustained the demurrer of the defendant in error Pratt upon the fourth ground stated, and dismissed the bill. (Tr. pp. 22-35.) Thereafter and on February 1, 1907, the exchange now sought to be enjoined was consummated. (Affd. J. W. Pratt.)

Plaintiff in error subsequently and on February 13, 1907, moved in the Supreme Court of Hawaii for the entry of a decree in accordance with the decision rendered by that court and containing a provision that the bill should be retained and the preliminary injunction be continued in force for the purpose of permitting an appeal to the Supreme Court of the United States. The Supreme Court, in deciding this motion, on February 15, 1907, (Tr. pp. 36-38), permitted the entry of a decree following their decision upon the merits, but refused to continue the injunction in force because the exchange of the lands sought to be prevented by plaintiff in error had been already made, subsequent to the decision of the Supreme Court and prior to the filing of plaintiff in error's motion.

Thereafter, and on June 6, 1907, a writ of error was allowed, (Tr. pp. 1 and 2), based upon various assignments of alleged error by the Supreme Court of Hawaii, which are claimed to be against the rights, privileges and immunities of plaintiff in error, as set forth in the statutes of the United States, to wit, in Section 73 of "An Act to Provide a Government for the Territory of Hawaii." (Tr. pp. 40-42.) Defendant in error now moves to dismiss the writ upon the grounds set forth in his motion on file.

ARGUMENT.

The sole ground upon which this writ is based is the claim that the right, title, privilege or immunity to which plaintiff in error is entitled under a statute of the United States, to wit, under Section 73 of "An Act to Provide a Government for the Territory of Hawaii" (31 Stat. at Large, 141), has been denied him because of the action of the Supreme Court of Hawaii in the various specific matters alleged to be error and set out in assignments of error numbered 1 to 6 inclusive. (Tr. pp. 41 and 42.)

No question is raised by this writ as to the *validity* either of a United States treaty or statute or an authority exercised under the United States on the one hand, or of a statute of the Territory or an authority exercised under the Territory on the other hand. (Tr. pp. 40-42.)

No claim is made that plaintiff is entitled to a review because the sum or value of $5000.00 is involved in this suit. (Tr. pp. 40-42.)

Unless therefore, it appears clearly from the record that some right, title, privilege or immunity secured to plaintiff in error

by the statute of the United States relied on has been denied him, this court has no jurisdiction in this case.

Defendants in error submit that the writ should be dismissed for the following reasons:

I.

THIS COURT HAS NO JURISDICTION IN THIS PROCEEDING.

A. No right, title, privilege or immunity granted plaintiff by Section 73 of "An Act to Provide a Government for the Territory of Hawaii" (31 Stat. at Large, 141), has been denied him.

This Section provides:

1. Until Congress shall otherwise provide, all land laws of the Territory shall remain in force;

2. That subject to the approval of the President, all dispositions of the public lands and all franchises granted by the Hawaiian Government between July 7th, 1898, and September 28th, 1899, are ratified and confirmed;

3. That in the land laws, such changes of nomenclature shall be made as become necessary by reason of the change in the form of government;

4. That no lease of agricultural land shall be made for a longer period than five years until Congress shall otherwise direct;

5. That funds arising from the disposition of public lands shall be appropriated under the laws of the Territory and applied to such uses and purposes as are consistent with the joint resolution of annexation approved July 7th, 1898.

Whatever rights are given by this section are included in the second, fourth and fifth subdivisions above made.

If plaintiff had been ousted from possession of lands heretofore granted him, or if his title to such lands had been attacked, or if it were proposed to lease agricultural lands for terms of more than five years, or if moneys obtained from the sale, lease or other disposition of lands were being, or proposed to be used in a manner not permitted by law, then plaintiff might be heard to complain that his rights, titles, privileges and immunities under this section were being denied.

B. But no such claims as these are made. The record, summarized in the statement of the case above, shows clearly that the question at issue here, and the only question, is as to the

authority of the Commissioner of Public Lands, with the approval of the Governor, to exchange certain public lands for certain other lands, in none of which lands plaintiff has or claims to have any interest (Tr. pp. 4-7).

Upon the question of official authority reference must be had to the local land laws of Hawaii continued in force by Section 73 referred to. The Supreme Court of Hawaii decided that under the law of Hawaii, power and authority to make the proposed exchange existed, (Tr. pp. 22-35), and therefore reversed the decree of the trial judge, sustained the demurrer and dismissed the bill (Tr. p. 28). The question, therefore, arises whether by such action, rights, privileges and immunities given plaintiff by the local land laws were denied him.

The land laws of Hawaii consist of Sections 42, 43, 44 and 48 of the Civil Code of 1859, as amended; Sections 1 and 2 of Chapter 44, Laws 1876, as amended; Chapter 26, Laws 1895, as amended by Chapter 78, Laws 1896, and Chapter 42, Laws 1898, and supplemented by Chapter 47, Laws 1896. They now form Chapters 20, 21 and 22 of the Revised Laws of Hawaii (1905), having been reënacted, but not changed in the revision of the laws of Hawaii submitted to the Legislature of 1905, and enacted by it as law by Act 3, Sessions Laws 1905.

The particular sections of the law involved in this case are Sections 252, 254 and 276. These sections read as follows:

> "Sec. 252. General Power to Dispose. The commissioner of public lands or superintendent of public works, as the case may be, by and with the authority of the governor, shall have power to lease, sell or otherwise dispose of the public lands, and other property, in such manner as he may deem best for the protection of agriculture, and the general welfare of the Territory, subject, however, to such restrictions as may, from time to time be expressly provided by law."
>
> "Sec. 254. No Auction, When. The provisions of Section 253 shall not extend or apply to cases where the government shall by quit-claim, or otherwise, dispose of its rights in any land by way of compromise or equitable settlements of the rights of claimants, nor to cases of exchange, or sales of government lands in return for parcels of land acquired for roads, sites of government buildings, or other government purposes."

"Sec. 276. Sales, at Auction, Exchange, etc. The commissioner may with the consent of the governor sell public lands not under lease, in parcels of not over one thousand acres, at public auction for cash. Upon any such sale and the payment of the full consideration therefor, a land patent shall be issued to the purchaser.

"And he may, with such consent, sell public lands not under lease in parcels of not over six hundred acres, at public auction upon part credit and part cash, and deliver possession under an agreement of sale containing conditions of residence on or improvement of the premises sold, or of payment by instalments or otherwise of the purchase price, or all or any of such conditions.

"And in case of default in the performance of such conditions, the commissioner may, with or without legal process and without notice, demand or previous entry, take possession of the premises and thereby determine the estate created by such agreement. In case of such forfeiture, such land shall be sold at auction either as a whole or in parcels, for cash or on terms of time payments in the discretion of the commissioner; and if such sale shall result in an advance on the original price, the original purchaser shall receive therefrom the amounts of his payments to the government on account of purchase, without the interest and a pro rata share in such advance in proportion to the amounts of his payments. If such sale shall result, however, in a less price than the original, the amount returnable to him shall be charged with a pro rata amount of such decrease proportioned to the amounts of his payments. The treasurer is hereby authorized to pay the amount returnable to the outgoing tenant, upon the requisition of the commissioner, out of any funds available for such purpose.

"Which agreement shall entitle the purchaser to a land patent of the premises upon the due performance of its conditions.

"The commissioner shall have authority to fix any upset price for all such sales for cash or part credit and part cash.

"All such sales shall be held in Honolulu, or in the district where the land to be sold is situated. Any

person designated by the commissioner may act as auctioneer at such sales without taking out an auctioneer's license.

"Provided, however, that land patents may be issued in exchange for deeds of private lands or by way of compromise upon the recommendation of the commissioner and with the approval of the governor without an auction sale, and further provided, that the governor may in his discretion upon such recommendation and approval, execute quitclaim deeds for perfecting the titles of private lands where such titles are purely equitable or where such lands are suffering under defective titles, or in cases of claims to use of lands upon legal or equitable grounds."

The decision is based upon the construction of the proviso contained in Section 276, (Tr. pp. 26, 27 and 29), and is to the effect that by this proviso power to make the proposed exchange is given the defendants in error.

Nowhere in these sections, and particularly in the portion upon which the decision is based, is any right, title, privilege or immunity given to plaintiff in error in express terms. Only by showing some injury or loss to himself by reason of the action of the officials of the government can any contention be successfully made that plaintiff in error has suffered and is entitled, therefore, to a review of the decision and judgment in this case before the Supreme Court of the United States.

No allegation, however, can be found in the bill that by reason of the proposed exchange plaintiff in error would suffer any pecuniary loss,

or that any property of his would thereby be injured or taken from him,

or that he would by reason of the exchange be obliged to pay an increased sum for taxes,

or that any injury whatever would be caused him. (Tr. pp. 4-7.)

On the contrary, the allegations of the bill are that certain public lands were about to be exchanged for certain private lands *"of equal value and of greater immediate service,"* (Tr. p. 6), and the authority of the officials to make such exchange was challenged, it being alleged that no legal right or authority existed in said officials by virtue of which such exchange could be made. (Tr. p. 6.)

The case was heard and determined upon this theory, and the decision of the Supreme Court of Hawaii finding that the

authority did exist is one of construction only, not discussing or passing upon any claim that a right of plaintiff in error was infringed, or any injury done him.

The revisionary power of the Supreme Court of the United States does not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that such rights were claimed under the Constitution, treaties or statutes of the United States. If a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare, and unless he does so declare specifically, that is, unmistakably, this court is without authority to re-examine the final judgment of a state court.

> *Green Bay v. Pattern Paper Co.*, 172 U. S. 58 @ 67;
> *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, @ 308;
> *N. Y. C. Ry. Co. v. N. Y.*, 186 U. S. 269 @ 272;
> *Capital Bank v. Cadiz Bank*, 172 U. S. 425 @ 430;
> *California Powder Works v. Davis*, 151 U. S. 389 @ 393;
> *Missouri P. Ry. Co. v. Fitzgerald*, 160 U. S. 556 @ 576;
> *Cornell v. Green*, 163 U. S. 75 @ 79-80;
> *New Orleans v. Quinlan*, 173 U. S. 191 @ 198;
> *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636 @ 643.

Even if the decision is considered as erroneous, yet where there has been a full hearing in the court below, a party is not deprived of his property without due process of law.

As is said in *Central Land Co. v. Lindley*, 159 U. S. 103 @ 112:

> "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States. *Walker v. Sauvinet*, 92 U. S. 90; *Head v. Amoskeag Co.*, 113 U. S. 9, 26; *Morley v. Lake Shore Railroad*, 146 U. S. 162, 171; *Bergmann v. Backer*, 157 U. S. 655."
>
> *Gibson v. Mississ*, 162 U. S. 565 @ 591;
> *Remington Paper Co. v. Watson*, 173 U. S. 443 @ 457;
> *In re Boardman*, 169 U. S. 39 @ 44.

Since plaintiff has based his writ upon the claim of a denial of a right, he cannot now raise any other question, such as the validity of a statute or of an authority or that the sum or value of $5000.00 is involved in this suit. ,

Dewey v. Des Moines, 173 U. S. 193 @ 198;
Chapin v. Frye, 179 U. S. 127 @ 129;
Herold v. Frank, 191 U. S. 558.

Even if the question of the validity of the authority could now be considered, yet the decision having been in favor of such validity, no Federal question is presented.

Abbott v. Tacoma Bank of Commerce, 175 U. S. 409 @ 413, and cases cited.

And where the question is not as to the validity but as to the existence or proper exercise of an authority under the United States, no Federal question is involved.

Millingar v. Hartupee, 6 Wall. 258 @ 262;
New Orleans v. N. O. Water Works Co., 142 U. S. 79 at 87;
Walsh v. Columbus, etc., R. R. Co., 176 U. S. 469 @ 475;
B. & P. Ry. v. Hopkins, 130 U. S. 210 @ 224.

Nor can plaintiff now claim that this court has jurisdiction because the amount or value of $5,000.00 is involved here, under the authority of Act of March 3, 1905 (33 Stat. at Large, 1035) for two reasons:

First. Because his writ is not based upon such a claim and he is therefore bound by his own pleading.

Dewer v. Des Moines, Supra;
Chapin v. Frye, Supra.

Second. Because the record clearly shows that such is not the fact. The bill alleges merely a threatened transfer of certain lands for other lands *of equal value and greater immediate service*, (Tr. p. 6), thus showing by implication a gain to the Territory, and therefore to its citizens. Further, no showing is made in the record, nor is any claim even made in the bill, of any direct loss to plaintiff, pecuniary or otherwise, or of any injury to him, direct or indirect.

In every case it is the amount of the interest of plaintiff, not the total value of the property involved, which determines the jurisdiction of the court.

As is said in *Colvin v. Jacksonville*, 158 U. S. 456 @ 459:

> "We are confined in the disposition of the case to the certificate, from which it appears that the case was heard upon a motion for an injunction and for the appointment of a receiver, on the bill and amended bill, answer, and affidavits. And that the court found as matter of fact that the entire amount of taxes which complainant would be obliged to pay as interest and sinking fund on account of the proposed issue of bonds would not exceed $2000, and thereupon dismissed the bill for want of jurisdiction. It was contended by complainant that the amount of taxes he would have to pay was not the amount in controversy, but that the total amount of the issue of bonds was. But this contention was overruled, and if the court did not err in that particular, and assuming, as we must, that complainant's liability did not exceed $2000, the decree of the court was right, since it was its duty, when it appeared to its satisfaction that the suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, to proceed no farther, and to dismiss the case. *Morris v. Gilmer*, 129 U. S. 315.
>
> "This leaves the only question to be considered whether the amount of the interest of complainant, and not the entire issue of bonds, was the amount in controversy, and, in respect of that, we have no doubt the ruling of the Circuit Court was correct."

Johnson v. Williams, 116 U. S. 393;
Wells v. Williams, 116 U. S. 393;
El Paso Water Co. v. El Paso, 152 U. S. 157;
Caffrey v. Oklahoma, 177 U. S. 346 @ 348.

C. But even if some right, privilege or immunity is given plaintiff in error by Sections 252, 254 and 276 R. L., quoted above, and such right, privilege or immunity has been denied him, still no federal question is involved because those sections are not statutes of the United States within the meaning of Section 709, Revised Statutes.

It is submitted that by Section 73 of the "Act to Provide a Government for the Territory of Hawaii" referred to, (31 Stat. at Large, 141), Congress did not enact the provisions of the land laws of Hawaii so as to make them statutes of the United States. That section continued such laws in force until

Congress should otherwise provide, thus preventing the local legislature from modifying and from repealing said laws or any portion of them. The real intent of Congress, as shown by said Section 73, was to prevent any modification or repeal by the local legislature, thus reserving to Congress alone the power to modify this part of the local law. If it had been the intent of Congress to enact the local land laws and to make those laws statutes of the United States, it would have been easy to have made such intent clear, and it is reasonable to suppose that such intent would have been expressed in plain and unambiguous language. The enactment of the local land laws by Congress would, of course, place them beyond the power of the local legislature to modify or repeal, without any statement having been made that they would remain unchanged "until Congress should otherwise provide." The use of this phrase, therefore, makes it clearer that the sole intent of Congress was to put it beyond the power of the legislature of Hawaii to modify the land laws here. The mere fact that Congress put it beyond the power of the local legislature to alter the land laws of Hawaii and reserved that power to itself is not enough to make those laws statutes of the United States. They stand therefore simply by permission of Congress, not by virtue of its enactment.

By Section 6 of "An Act to Provide a Government for the Territory of Hawaii," (31 Stat. at Large, 141), all laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of said Act, were continued in force, subject to repeal or amendment either by the Legislature of Hawaii, or the Congress of the United States. It cannot be reasonably contended that these laws, by reason of their continuance in force, became statutes of the United States with power given the local legislature to repeal or amend them, which power Congress also retained, yet such a construction would be as reasonable in the case of the general laws of Hawaii as in the case of the land laws.

By Section 86 of "An Act to Provide a Government for the Territory of Hawaii," (31 Stat. at Large, 141), Congress provided that appeals, writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii, should be taken in accordance with the laws governing such appeals, writs of error, removal of causes and other matters and proceedings between the courts of the States and the courts of the United States. This provision placed Hawaii upon a different footing

in this regard from that occupied by any other Territory of the United States. It is submitted therefore, that this provision places the laws of Hawaii upon the same footing as the laws of a State. The intent of Congress as shown in this section strengthens the argument that Congress did not enact the land laws of Hawaii and make them statutes of the United States, nor did it intend to do so. Therefore said land laws are to be considered as local laws or laws only of the Territory of Hawaii and upon the same basis as any laws of any State with regard to appeals or writs of error.

This being so, this court lacks jurisdiction because the decision of a State court arising upon the *construction* of a local law is final, and does not present a Federal question.

Grand Gulf Ry. Co. v. Marshall, 12 How. (U. S.) 165 @ 167;
Ferry v. King County, 141 U. S. 668;
Snell v. Chicago, 152 U. S. 191;
St. Joseph, etc., Ry. v. Steele, 167 U. S. 659;
Hooker v. Los Angeles, 188 U. S. 314 @ 317;
Baldwin v. Kansas, 129 U. S. 52 @ 57;
Telluride Powder Co. v. Rio Grande, 175 U. S. 639 @ 647;
Missouri v. Harris, 144 U. S. 210;
Sage v. Louisiana, 144 U. S. 647;
Powell v. Brunswick Co., 150 U. S. 433;
Telluride Powder Co. v. Rio Grande, 187 U. S. 569;
Wilson v. N. C., 169 U. S. 586 @ 595.

The statute of a Territory is not a statute of the United States within the meaning of Section 709, Revised Statutes.

Miners' Bank v. Iowa, 12 How. 1, @ 5 and 6;
Messinger v. Mason, 10 Wall. 507;
Saganaw Gas Light v. Saganaw, 28 Fed. 529, @ 532.

The conclusion above that the land laws of Hawaii are local laws only, and not statutes of the United States, makes the reasoning of the foregoing decisions applicable to this case and binding on this court.

II.

PLAINTIFF IN ERROR HAS NO STANDING IN COURT BECAUSE IT APPEARS THAT HE HAS NO INTEREST WHATEVER AT STAKE IN THIS CONTROVERSY.

It is a rule that a court will take cognizance of suits at law or proceedings in equity only when some injury has been, or appears to have been done, or is or appears to be threatening the complaining party. The aid of the court will not be extended to one who is suffering no wrong and is not fearing a threatened injury.

The law is settled in Hawaii, as in other jurisdictions, that a taxpayer may have his remedy by injunction against official acts which involve the misuse or waste of public funds.

Crampton v. Zabriskie, 101 U. S. 601 @ 609;
Castle v. Kapena, 5 Haw. 27;
Lucas v. Amer.-Haw. E. & C. Co., 16 Haw. 80;
Castle v. Atkinson, 16 Haw. 769.

But the case at bar is not within this rule.

It is also a settled rule of law that it must appear affirmatively from the pleadings that injury, and substantial injury, will be sustained by plaintiff from the acts complained of, before such acts will be enjoined.

Smith v. Indiana, 191 U. S. 138 @ 146;
Caffrey v. Oklahoma, 177 U. S. 346 @ 348;
Clark v. Kansas City, 176 U. S. 114 @ 118;
Red River Valley Bank v. Craig, 181 U. S. 548 @ 558;
Supervisors v. Stanley, 105 U. S. 305 @ 314;
Ludeling v. Chaffe, 143 U. S. 301 @ 304;
Giles v. Little, 134 U. S. 645 @ 650;
Ewings v. Norwood, 5 Cranch. 344 @ 348;
Montgomery v. Hernandez, 12 Wheat. 129 @ 132;
Henderson v. Tenn., 10 How. 311 @ 322;
Hale v. Gaines, 22 How. 144 @ 160;
Long v. Converse, 91 U. S. 105.

In this case, however, not only is there no allegation or claim of injury made in the bill upon which the prayer for an injunction is based (Tr. pp. 4-7), but it further appears affirmatively from the bill that plaintiff, as a taxpayer, will gain rather than lose by the exchange (Tr. pp. 6 and 24). The facts as they

appear from the record are that an exchange of certain public lands was proposed, not only for lands *"equal in value"* but also *"of greater immediate service"* to the Territory (Tr. p. 6). As is said in the prevailing opinion of the Supreme Court of Hawaii in this case:

> "In the present case the bill does not show whether the loss of revenue from rent would be offset by rents from land of equivalent value or by a saving of revenue which otherwise would be used. In the absence of an averment of loss none can be inferred. The taxpayer would gain from the transaction pecuniarily if the Territory should thereby obtain property for such public uses as school houses, for instance, for which otherwise legislative appropriations would be made requiring increased taxation and in such cases the plaintiff's only interest would be his desire that the public land laws be correctly administered."
>
> Opinion of Justice Hartwell. (Tr. p. 24.)

The Supreme Court of Hawaii did not pass upon the question of the plaintiff's right to bring this proceeding, deeming it unnecessary on account of the view held by it upon the question of the authority of the officials to make the proposed exchange (Tr. p. 24), but defendant in error now submits that upon this ground alone the writ should be dismissed.

III.

THIS WRIT SHOULD BE DISMISSED BECAUSE THE ACT SOUGHT TO BE ENJOINED HAS BEEN ALREADY PERFORMED.

As this case now stands this court is asked to enjoin the doing of an act already done. In this proceeding, therefore, the question is a moot, or frivolous one. The record, summarized in the statement of the case above, shows that after the filing of the decision of the Supreme Court of Hawaii holding that "the decree appealed from is reversed, the demurrer is sustained and the bill dismissed" (Opinion Justice Hartwell) (Tr. p. 28), and prior to the motion of plaintiff in error for a decree continuing the injunction in force pending an appeal, the act against which an injunction was sought had been done (Affd. J. W. Pratt; Tr. pp. 36 and 37). Relying upon the opinion of the Supreme Court of Hawaii *dismissing* the bill, the officers

forthwith acted and accomplished what had been proposed,—what they had theretofore been prevented from doing. At the time this action was taken no process restraining them or either of them was outstanding, and they had the authority of the Supreme Court of Hawaii for thinking that full power was given them by law to complete the transaction. Acting with this justifiable belief, and upon the theory that delay was no longer necessary, the exchange was made.

This brings the case within the rule laid down by this court in the following decisions:

Singer Mfg. Co. v. Wright, 141 U. S. 696 @ 699;
Little v. Bowers, 134 U. S. 547 @ 557;
Mills v. Green, 159 U. S. 651 @ 653;
California v. S. P. & T. R. R. Co., 149 U. S. 308 @ 313.

In view of the decision of the local Supreme Court, these cases cannot be distinguished on the theory that the doing of the act was the *fault* of defendants in error. They were fully justified in their belief that the decision of the Supreme Court of Hawaii, *sustaining the demurrer and dismissing the bill,* (Tr. p. 28), put an end to this litigation even without the entry of a formal decree, the decision itself being so worded as to make the entry of a decree for all practical purposes useless. The local court recognized this fact in its decision on the motion for a continuance of the injunction and refused to so order. (Tr. p. 37.)

As the record stands therefore, no relief can be granted by this court, and this writ should therefore be dismissed.

Respectfully submitted,

Honolulu, Hawaii, October 31st, 1907.

(Sgn.) C. R. HEMENWAY,
Attorney General of Hawaii.

(Sgn.) WM. L. WHITNEY,
1st Deputy Attorney General of Hawaii.

(Sgn.) CHARLES F. CLEMONS,
(Sgn.) HENRY E. COOPER,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

L. L. McCANDLESS,
Plaintiff in Error,

vs.

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Defendants in Error.

Service of a copy of the foregoing Motion, Affidavit and Brief is hereby admitted this 31st day of October, A. D. 1907.

(Sgn.) A. G. M. ROBERTSON,
Attorney for Plaintiff in Error.

12

Office Supreme Court, U. S.
FILED.
DEC 5 1907
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1907.

No. [redacted]109.

L. L. McCANDLESS,

Plaintiff in Error,

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GEORGE R. CARTER, GOVERNOR OF THE TERRITORY OF HAWAII, AND JAMES W. PRATT, COMMISSIONER OF PUBLIC LANDS OF THE TERRITORY OF HAWAII,

Defendants in Error.

Brief for the Plaintiff on Defendants' Motion to Dismiss.

A. G. M. ROBERTSON,
Attorney for Plaintiff in Error.

(20,764.)

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1907.

No. 361.

L. L. McCANDLESS,

Plaintiff in Error,

vs.

GEORGE R. CARTER, GOVERNOR OF THE TERRITORY OF HAWAII, AND JAMES W. PRATT, COMMISSIONER OF PUBLIC LANDS OF THE TERRITORY OF HAWAII,

Defendants in Error.

Brief for the Plaintiff on Defendants' Motion to Dismiss.

STATEMENT

In this case the plaintiff in error, who was also the complainant below, exhibited his bill in equity in the circuit court of the first judicial circuit of the Territory of Hawaii, praying for an injunction to restrain the respondent, Pratt, as commissioner of public lands, from exchanging certain lands described in the bill, and restraining the respondent, Carter, as governor, from con-

senting to or approving such exchange. (Tr., pp. 4, 7.)

In his bill the complainant alleged that he is a citizen of the United States, a resident of the Territory of Hawaii, and a property owner and tax-payer in said Territory; that the respondent, Pratt, is the duly appointed and acting commissioner of public lands for said Territory; that the respondent, Carter, is the duly appointed and acting governor of said Territory; that said Territory is the owner of certain public lands on the island of Lanai, in said Territory, which are specified in said bill of complaint. (Tr., p. 4.) That said lands, which contain an aggregate area of over forty-seven thousand acres, no single parcel being less than two thousand acres in area, are under lease to one Charles Gay; that said lands comprise all the public lands on said island, and constitute more than one-half of the area of said island; and that on the 28th day of November, 1906, the respondent, Carter, advertised for offers of other lands of equal value and of greater immediate service to the Territorial government in exchange for said Lanai lands. (Tr., p. 5.) That the respondents threaten to make such an exchange unless restrained and enjoined from so doing; that the respondents have no legal right or authority to make such exchange, the same not being by way of compromise or equitable settlement of the rights of claimants, nor by way of exchange for parcels of land acquired for any road, nor for sites for government buildings, nor for any other purpose; that said public lands of Lanai are of great value, being good grazing land, and having sea frontage and good harbors. (Tr., p. 6.) And that the said proposed exchange of lands by said respondents is not authorized by any law of said Territory, or of the

United States, and that such exchange should be enjoined. (Tr., p. 7.)

Upon the filing of this bill of complaint a circuit judge issued a temporary injunction directed to both the respondents. (Tr., p. 8.)

The respondent, Carter, then moved to dissolve the temporary injunction and dismiss the bill on the grounds that the court had no jurisdiction of the person of the governor of the Territory; that it constituted an attempt to interefere with, coerce and restrain the governor in the exercise of his discretion in the execution of his powers, and an unwarranted and illegal assumption of judicial control of the official acts of the governor. (Tr., pp. 10, 11.) This motion was granted. (Tr., p. 13.) The respondent, Pratt, demurred to the bill on several grounds. (Tr., pp. 11, 12.) The circuit judge overruled the demurrer and an interlocutory decree to that effect was duly entered. (Tr., pp. 14 to 19.) From that decree, the same being appealable in the discretion of the circuit judge, the respondent, Pratt, appealed to the Supreme Court of the Territory. (Tr., p. 20.) The Supreme Court, Mr. Justice Wilder, dissenting, held that under Section 276 of the Revised Laws of Hawaii, the commissioner of public lands had authority to make the proposed exchange, (Tr., pp. 22 to 28), and entered a decree sustaining the demurrer and dismissing the bill with costs. (Tr., p. 38.)

The plaintiff sued out a writ of error to review this decree of the Supreme Court of the Territory, and states six assignments of error. (Tr., pp. 40, 41.)

The gist of the controversy is this: The commissioner of public lands proposed, with the approval and consent of the governor, to exchange the public lands on the

island of Lanai for other lands "of equal value and of greater immediate service" to the Territory; these officials were purporting to act under the authority of Section 276 of the Revised Laws of Hawaii which provides as follows:

> "The commissioner may with the consent of the "governor sell public lands not under lease in "parcels of not over one thousand acres, at public "auction for cash. Upon any such sale and the "payment of the full consideration therefor, a land "patent shall be issued to the purchaser.
>
> "And he may, with such consent, sell public "lands not under lease in parcels of not over six "hundred acres, at public auction upon part credit " and part cash, and deliver possession under an "agreement of sale containing conditions of resi- "dence on or improvement of the premises sold, or "of payment by instalments or otherwise of the "purchase price, or all or any of such conditions.
>
> "And in case of default in the performance of "such conditions, the commissioner may, with or "without legal process and without notice, demand "or previous entry, take possession of the premises "and thereby determine the estate created by such "agreement. In case of such forfeiture, such land "shall be sold at auction either as a whole or in "parcels, for cash or on terms of time payments "in the discretion of the commissioner; and if such "sale shall result in an advance on the original "price, the original purchaser shall receive there- "from the amounts of his payments to the govern- "ment on account of purchase, without the interest "and a pro rata share in such advance in propor- "tion to the amounts of his payments. If such sale "shall result, however, in a less price than the ori- "ginal, the amount returnable to him shall be "charged with a pro rata amount of such decrease

"proportioned to the amounts of his payments. The "treasurer is hereby authorized to pay the amount "returnable to the outgoing tenant, upon the re- "quisition of the commissioner, out of any funds "available for such purpose.

"Which agreement shall entitle the purchaser to " a land patent of the premises upon the due per- "formance of its conditions.

"The commissioner shall have authority to fix "any upset price for all such sales for cash or part "credit and part cash.

"All such sales shall be held in Honolulu, or in "the district where the land to be sold is situated. "Any person designated by the commissioner may "act as auctioneer at such sales without taking out "an auctioneer's license.

"PROVIDED, however, that land patents may "be issued in exchange for deeds of private lands "or by by way of compromise upon the recommen- "dation of the commissioner and with the approval "of the governor without an auction sale, and fur- "ther provided, that the governor may in his dis- "cretion upon such recommendation and approval, "execute quitclaim deeds for perfecting the titles "of private lands where such titles are purely equi- "table or where such lands are suffering under de- "fective titles, or in cases of claims to use of lands "upon legal or equitable grounds."

Every one of the several parcels of land involved herein exceeded one thousand acres in area, and all of them were subject to existing leases.

The complainant contended that under these circumstances, on a proper construction of the statute, there was no authority of law for the proposed exchange; that the power to exchange contained in the last paragraph of the section quoted, being by way of a proviso, had ref-

erence to and was controlled by the first paragraph of the section, and was, therefore, distinctly limited to "public lands not under lease, in parcels of not over one thousand acres."

There was no pretense that the proposed exchange was "by way of compromise," or "for perfecting the titles of private lands where such titles are purely equitable, or where such lands are suffering under defective titles, or in cases of claims to use of lands upon legal or equitable grounds." In fact the terms of the governor's advertisement (Tr., p. 5) negatived any such proposition.

The complainant claimed to be entitled to the relief prayed for as a citizen and tax-payer of Hawaii, and for the reason that as under the laws of Hawaii (Revised Laws, Section 1549) it is the duty of the Attorney General to defend suits brought against his fellow officers, it is left to individual citizens to invoke the aid of the courts to prevent any wrongful disposition of public property by public officials, and to protect public interests from official misconduct.

The first assignment of error is not relied on, nor is the motion of Walter F. Frear, the present governor of Hawaii, and successor in office of said Carter, to dismiss the writ of error as to the governor, resisted.

The defendant in error, Pratt, moves to dismiss the writ of error on the grounds, that no federal question is involved; that the plaintiff in error has no interest in the controversy; and because the act against the doing of which the injunction was sought has been performed.

These grounds will be considered in the order stated.

ARGUMENT

I.

Federal Question—Jurisdiction.

The plaintiff in error contends that a Federal question is involved and that this Court has jurisdiction under the third class of cases enumerated in the Revised Statutes of the United States, Section 709.

He contends that the record shows that he has set up and claimed a title, right or privilege under a statute of the United States, and that the decision of the court of last resort in the Territory of Hawaii was against his claim.

It is assumed for the purposes of this branch of the argument that the plaintiff in error has sufficient interest in the subject matter of the suit to exhibit and maintain his bill in the courts of the Territory. This point will be discussed under the next following head.

The first question is whether the statute under which this controversy arose is a statute of the United States.

Section 276 of the Revised Laws of Hawaii is a part of the statutory law of the Territory relating to the public lands, and was in force prior to and at the time of the organization of the Territory. (Ballou's compilation, Civil Laws 1897, Sec. 201.)

This statutory provision was therefore included in and covered by Section 73 of the Organic Act of Hawaii, providing, "That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide."

Plaintiff's contention is that the enactment by Con-

gress of this provision, continuing the land laws in force and at the same time taking them out of the jurisdiction of the local legislature to amend, modify, or repeal, was equivalent to a direct enactment of said land laws by Congress. Those land laws cannot now be properly called laws of Hawaii in face of the fact that Hawaii no longer has anything to say as to whether they shall remain in force, or be amended, or be repealed.

In the case of Williams vs. Bruffy, 96 U. S. 176, 183 (cited with approval in Stevens vs. Griffith, 111 U. S. 48; and New Orleans Water Works Co. vs. Louisiana Sugar Refining Co., 125 U. S. 18) this Court said "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court. It would be a narrow construction to limit the term to such enactments as have gone through various stages of consideration by the legislature."

The same principle would seem to be fully applicable to Federal laws. Any enactment from whatever source originating, to which Congress has given the force of law, *and reserving the sole right of amendment and repeal,* should be regarded as a statute of the United States within the meaning of the clause relating to the appellate jurisdiction of this Court.

This matter of amendment and repeal places the Hawaiian land laws on an entirely different footing from the other laws of Hawaii which were merely continued in force, subject to local legislative control by Section 6 of the Organic Act of Hawaii.

Provisions similar to that last referred to are to be found in the organic acts of other Territories, but the reserva-

tion by Congress of the right to alter seems to be anomalous. The fact that the right to amend and repeal laws which have been extended to Territories by Congress has been given to the Territorial legislatures, has led this Court to hold that such laws are not United States statutes, and cases so holding seem, inferentialiy at least, to support the contention of the plaintiff in this case. Thus, in Messenger vs. Mason, 10 Wall. 507, this Court held that certain laws which were extended to the Territory of Iowa, by Congress, through the organic act of that Territory, were not to be regarded as Federal laws for the reason that " the same section that conferred these rights and privileges upon the Territory of Iowa provided that they should be subject to be altered, modified or repealed by the governor and legislative assembly of said Territory."

The contention here made is strengthened by the fact that the ultimate title to the public lands of Hawaii is vested in the United States by virtue of the joint resolution of annexation approved July 7, 1898; that the Territory merely has the use and benefit of the same with the right of disposition according to existing statutory provisions. (See Organic Act, Sec. 91.)

Said joint resolution of annexation also provided that, "The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition." The special enactment then contemplated finally took form in Section 73 of the Organic Act of Hawaii.

If the foregoing contention is sound, and if the further contention hereinafter made, that the plainitff had sufficient interest in the subject matter to entitle him to in-

stitute this suit, or that that point is to be considered on the merits of the case, is found to be correct, we submit that a Federal question is clearly involved. The case is on the same basis as though there were two claimants contesting rights in public lands of the United States, or litigating conflicting titles under grants from the United States. This Court has frequently taken jurisdiction of such cases.

In Matthews v. Zane, 4 Cranch 382, both parties claimed title to land under the same act of Congress. The decision of the state court was against the plaintiff in error. It was held that this Court had jurisdiction, Chief Justice Marshall saying,"It is supposed that the act intends to give this court the power of rendering uniform the construction of the laws of the United States, and the decisions upon rights or titles, claimed under those laws."

In Ross v. Barland, 1 Peters 655, the Court said,—"In this case the titles of both parties are derived under an act of Congress; *the construction of the statute is drawn directly in question;* and the decision of the highest court of law of the State is against the title and right of the party, specially set up in his defence under the statute. This case is not distinguishable from the case of Matthews v. Zane, 4 Cranch, 382, in which the jurisdiction of this court was maintained."

> "There is no question here as to the jurisdiction "of this court, although the case comes from the "Supreme Court of a State, for every matter in "dispute arises either under the treaty of 1803, the "acts of Congress in regard to these lands, or the "authority of some officer of the government of the "United States exercised over them."
>
> Glascow v. Baker, 128 U. S. 560, 571.

"It is immaterial that the state court considered "the case to be within the provisions of certain "state statutes, the grasp of the federal statute "must first be released. The construction and "scope of that are federal questions, in respect to "which the party who claims under such statute, "and whose claim is denied, has a right to invoke "the judgment of this court."

Anderson v. Carkins, 135 U. S. 483, 486.

This court has frequently taken jurisdiction of cases brought up from the state courts in which title to land was involved where the title was claimed to have been derived from the United States.

Johnson v. Towsley, 13 Wall. 72;
Baldwin v. Stark, 107 U. S. 463;
Bohall v. Dilla, 114 U. S. 47;
Sparks v. Pierce, 115 U. S. 408;
Packer v. Bird, 137 U. S. 661;
Knight v. U. S. Land Assn., 142 U. S. 161;
Shively v. Bowlby, 152 U. S. 1;
Joplin v. Chachere, 192 U. S. 94.

"The patent having been issued by officers of the "land department, to whose supervision and con- "trol are entrusted the various proceedings requir- "ed for the alienation of the public lands, all rea- "sonable presumptions are indulged in support of "their action. It cannot be attacked collaterally, "but only by a direct proceeding instituted by the "government or by parties acting in its name and "by its authority. *If, however, the officers of the "land department mistake the law applicable to "the facts or misconstrue the statutes and issue a "patent to one not entitled to it,* the party wronged "can resort to a court of equity to correct the mis- "take and compel the transfer of the legal title to

"him as the true owner. The court in such a case "merely directs that to be done which those officers "would have done if no error of law had been com- "mitted."

Lee v. Johnson, 116 U. S. 48-49;

See also, Duluth & J. R. Railroad Co. v. Roy, 173 U. S. 587.

It has been repeatedly held that in the absence of fraud the courts will not interfere with the officers of the land department in the performance of their duties, or in passing on facts which form the basis of their action, *but where such officers act on a misinterpretation or misunderstanding of the law, the authority of the court to grant relief to a complaining party in a proper case cannot be doubted.*

The Federal question appears in the record.

It is not necessary that the particular provision of the constitution, treaty, or act of Congress, on which the Federal right is based should have been pleaded specially or spread on the record. It is sufficient that the record shows that it has been misconstrued or misapplied.

In the case of Bridge Proprietors v. Hoboken Company, 1 Wall. 116, 143, the court said, "Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of Congress, or part of the Constitution supposed to be infringed by the state law, ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution, or act of Congress, was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

That case was cited with approval in McCullough v. Virginia, 172 U. S. 102, 119.

In the class of cases to which the case at bar belongs it has been definitely decided that it is not necessary that the right, title, privilege or immunity claimed should be expressly set up in the pleadings. *It is sufficient that it appears from the opinion of the state court that the claim was urged, considered, and determined by the court adversely to the plaintiff in error.*

San Jose L. & W. Co. v. San Jose Ranch Co., 189 U. S. 177;

Montana v. Rice, 204 U. S. 291;

Hammond v. Whittredge, 204 U. S. 538.

In San Jose L. & W. Co. v. San Jose Ranch Co., where the question was elaborately considered, it was clearly intimated that former decisions of this court seemingly taking a stricter view of the matter should be considered not to be in accord with the present view of the court.

In Hammond v. Whittredge, where the defendants in error, in support of their motion to dismiss, urged that the decision of the court below resulted from facts found or admitted, and from general principles of law, and that there remained in the case no question as to any title, right, privilege or immunity under a statute of the United States, the court said that where "rights under a statute of the United States were claimed by plaintiff in error, and that statute was referred to by the supreme judicial court, and was an element in its decision," a Federal question was sufficiently made to appear.

It is clear from a reading of the opinion of the majority of the Supreme Court of Hawaii, and also the dissenting opinion, that this case turned entirely upon the construction of certain provisions of the land laws of Ha-

waii, which, we contend, are statutes of the United States. (Tr., pp. 22, 35.)

It is earnestly submitted, therefore, that a Federal question is involved in this case, and that that fact sufficiently appears in the record.

II.

The Interest of Plaintiff in Error in this Controversy.

The point sought to be made by the defendant in error under this head involves the merits of the case, and is not a ground for dismissal on motion.

If the writ is in proper form, and the court has jurisdiction, all questions touching the right of the complainant to the relief sought should await the hearing on the merits.

Sparrow v. Strong, 3 Wall. 97, 105.

On the merits, we contend that under the practice of this jurisdiction it is not necessary for a complainant who is moving purely in the interests of the public to prevent misfeasance in office, or to protect public property from loss through the mistake, incompetence, or worse, of public officers, to show special injury.

As already pointed out, Section 1549 of the Revised Laws of Hawaii, requires the Attorney General to appear for and represent the officers of the government in proceedings in court without charge. That is part, and a principal part, of the Attorney General's duty. It is not the practice here, as it is in other jurisdictions, to bring cases of this character in the name of the Territory upon the information of an individual *ex-relatione.*

Castle v. Kapena, 5 Haw. 27;

Lucas v. A. H. E. & C. Co., 16 Haw. 80;
Castle v. Atkinson, 16 Haw. 769.

In the Lucas case, the Supreme Court of Hawaii said,

> "It is next contended that the plaintiff has no right "as a tax-payer to maintain this suit. The right of "a tax-payer to bring suit to restrain a public offi- "cer from doing an illegal act has been settled in "this jurisdiction since the case of Castle v. Ka- "pena, 5 Haw. 27. x x x x *It is not neces- "sary that the plaintiff should show actual damage to "himself and to all others similarly situated,* as is "contended by the Assistant Attorney General."

The rule adopted in Hawaii is based on decisions of this Court which were referred to in the cases above cited.

U. P. Railroad Co. v. Hall, 91 U. S. 343;
Crampton v. Zabriskie, 101 U. S. 601.

It should make no difference as to this point that the exchange contemplated by the governor and the commissioner of public lands was to be for lands of equal value. In the numerous reported cases in which the courts have held in favor of the right of a tax-payer to an injunction to prevent the illegal expenditure of public money, the right has not been maintained on the ground that the public was not to receive a quid pro quo, but on the ground of the lack of legal authority to make the proposed expenditure.

See,

Winn v. Shaw, 87 Cal. 631;
Nelson v. Commissioners, 6 Colo. App. 279;
Stratford v. Greensboro, 124 N. C. 127;
Times Pub. Co. v. Everett, 9 Wash. 518;
Stevens v. St. Mary's School, 144 Ill. 336;
State v. Commissioners, 22 Nev. 87.

III.

The Act Sought to be Enjoined Already Performed.

It appears (Tr., pp. 36, 37) that immediately upon the rendition of its decision by the Supreme Court of Hawaii the transaction sought to be enjoined and prevented was consummated. The defendant in error now urges this fact as a reason why the writ of error should be dismissed. The cases cited in the defendants' brief do not support the contention made.

There is a radical difference between cases where the act sought to be enjoined is no longer intended to be performed, such as has occurred in cases where an injunction was sought to prevent the collection of a tax which has been volutarily paid by the complainant, and in cases arising under election laws where the election has, in the meantime, been held.

Neither is this a case where the act sought to be performed has been accomplished without the assistance of the defendant.

Here the defendant himself, without waiting for the entry of a decree in the case, deliberately proceeded to carry out the exchange which the complainant complained of as being illegal. Under these circumstances the defendant ought not to be heard to set up his own act as a reason for dismissing the case.

In Mills v. Green, 159 U. S. 651, 654, the court said,

> "If a defendant, indeed, after notice of the filing "of a bill in equity for an injunction to restrain the "building of a house or of a railroad, or of any "other structure, persists in completing the build- "ing, the court nevertheless is not deprived of the

"authority, whenever in its opinion justice requires "it, to deal with the rights of the parties as they "stood at the commencement of the suit, and to "compel the defendant to undo what he has wrong-"fully done since that time, or to answer in dam-"ages."

While the court below strongly condemned the defendants' action, it was thought best to let the matter stand pending the decision of this Court. (Tr., p. 37.)

This is no mere moot case, and no practical difficulty would ensue if, upon a consideration of the case on its merits, this Court should reverse the decree appealed from. Upon the case being remanded to the trial court, the complainant could, by supplemental bill, set up the new matter and bring in such new parties as might be necessary, to obtain an effectual decree.

If there is merit in the complainant's case it would be a most remarkable thing that the courts could be thwarted in granting relief and ousted of jurisdiction by the defiant, if not contemptuous, conduct of the defendant.

"The action of the land department cannot over-"ride the expressed will of Congress, or convey "away public lands in disregard or defiance there-"of."

Johnson v. Drew, 171 U. S. 93, 100.

It is respectfully submitted that the motion to dismiss should be denied.

A. G. M. ROBERTSON,
Attorney for plaintiff in error.

SUPREME COURT OF THE UNITED STATES

October Term, 1906

No. 109

S. L. McCANDLESS, Plaintiff in Error,

vs.

GEORGE CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR PLAINTIFF IN ERROR.

A. G. M. Robertson,
Counsel for Plaintiff in Error.
Washington, D. C.
Address for Service in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 109.

L. L. McCANDLESS, PLAINTIFF IN ERROR,

vs.

GEORGE CARTER, GOVERNOR OF THE TERRITORY OF HAWAII, AND JAMES W. PRATT, COMMISSIONER OF PUBLIC LANDS OF THE TERRITORY OF HAWAII.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error was the complainant in the court of first instance wherein he filed a bill for an injunction to restrain an exchange of certain public lands comprising more than one-half of one of the principal islands which compose the Territory of Hawaii. The respondents in the case were George R. Carter, then Governor of Hawaii, and James W. Pratt, Commissioner of Public Lands of said Territory. The case as against the Governor has been dismissed and no question as to such dismissal is herein presented. In regard to the respondent Pratt, his demurrer to

the bill of complaint was overruled by the Circuit Judge, but upon an interlocutory appeal, allowed according to the practice in Hawaii, to the Territorial Supreme Court, the decree of the Circuit Judge was reversed, and a decree entered dismissing the bill (Tr., 38).

The facts involved in this controversy, as set forth in the bill of complaint, appear in condensed form in the brief of the plaintiff in error heretofore filed in this court, pp. 1-6, in opposition to the pending motion to dismiss the writ. To avoid repetition reference is respectfully made thereto.

Assignment of Errors (Tr., 40-42).

Three points are here presented by the assignment of errors (Tr., 40-42) in addition to the question as to whether a Federal question is involved (which was discussed in the brief filed in opposition to the pending motion to dismiss, consideration of that motion having been postponed until the hearing of the cause upon the merits (pp. 7, 14), being:

(1) Is there any authority of law for the exchange of said lands under the circumstances alleged?

(2) Has the plaintiff sufficient interest to enable him to maintain the bill, and

(3) Does the fact that the act sought to be restrained has been performed and on the day the cause was decided in the Supreme Court of Hawaii prevent the granting of the relief prayed for?

ARGUMENT.

I.

Originally the respondent claimed to be acting under the authority of either or both of two provisions of the statutes of Hawaii, to wit, Sections 252 and 254, and Section 276 of the Revised Laws of Hawaii.

Section 252 provides as follows:

> "The commissioner of public lands or superintendent of public works, as the case may be, by and with the authority of the governor, shall have power to lease, sell or otherwise dispose of the public lands, and other property, in such manner as he may deem best for the protection of agriculture, and the general welfare of the Territory, subject, however, to such restrictions as may, from time to time, be expressly provided by law."

And section 254, as follows:

> "The provisions of section 253 shall not extend or apply to cases where the government shall by quitclaim, or otherwise, dispose of its rights in any land by way of compromise or equitable settlements of the rights of claimants, nor to cases of exchange, or sales of government lands in return for parcels of land acquired for roads, sites of government buildings, or other government purposes."

The contention that authority to make the exchange of the lands in question existed in the commissioner of public lands under those sections was so effectually disposed of by the concurring opinion of Frear, C. J. (Tr., 28, 29), that we assume it will not be relied on in this court, and therefore we will not discuss it here.

Section 276 reads as follows:

> "The commissioner may with the consent of the governor sell public lands not under lease, in parcels

of not over one thousand acres, at public auction for cash. Upon any such sale and the payment of the full consideration therefor, a land patent shall be issued to the purchaser.

"And he may, with such consent, sell public lands not under lease in parcels of not over six hundred acres, at public auction upon part credit and part cash, and deliver possession under an agreement of sale containing conditions of residence on or improvement of the premises sold, or of payment by installments, or otherwise of the purchase price, or all or any of such conditions.

"And in case of default in the performance of such conditions, the commissioner may, with or without legal process and without notice, demand or previous entry, take possession of the premises and thereby determine the estate created by such agreement. In case of such forfeiture, such land shall be sold at auction either as a whole or in parcels, for cash or on terms of time payments in the discretion of the commissioner; and if such sale shall result in an advance on the original price, the original purchaser shall receive therefrom the amounts of his payments to the government on account of purchase, without the interest and a pro rata share in such advance in proportion to the amounts of his payments. If such sale shall result, however, in a less price than the original, the amount returnable to him shall be charged with a pro rate amount of such decrease proportion to the amounts of his payments. The treasurer is hereby authorized to pay the amount returnable to the out-going tenant, upon the requisition of the commissioner, out of any funds available for such purpose.

"Which agreement shall entitle the purchaser to a land patent of the premises upon the due performance of its conditions.

"The commissioner shall have authority to fix any upset price for all such sales for cash or part credit and part cash.

"All such sales shall be held in Honolulu, or in the district where the land to be sold is situated. Any person designated by the commissioner may act as

auctioneer at such sales without taking out an auctioneer's license.

"*Provided, however*, That land patents may be issued in exchange for deeds of private lands or by way of compromise upon the recommendation of the commissioner and with the approval of the governor without an auction sale, and further provided, that the governor may in his discretion upon such recommendation and approval, execute quitclaim deeds for perfecting the titles of private lands where such titles are purely equitable or where such lands are suffering under defective titles, or in cases of claims to use of lands upon legal or equitable grounds."

Under that section the commissioner of public lands may with the consent of the governor, sell lands not already under lease in parcels of not over 1,000 acres at public auction for cash, or in parcels of not over 600 acres upon part credit and part cash. If the sale is for cash a land patent is issued to the purchaser immediately, and if on deferred payments, an agreement is executed, upon the performance of which the purchaser will become entitled to receive a patent. Land patents may be issued for such lands in exchange for deeds of private lands.

The question is whether the proviso in the latter part of the section relating to the exchange of lands was intended to introduce a new element unhampered by and without any reference to the provisions of the main body of the section or whether the general rule that a proviso must be understood as intended to limit, qualify, or explain what immediately precedes it, and be construed with special reference to the preceding subject-matter, should be applied.

The majority of the justices of the Supreme Court of Hawaii took the first mentioned view, but, as we believe, erroneously. Their reasoning is, we submit, not convincing.

Mr. Justice Hartwell said (Tr., p. 26):

> "The exercise of this power is not expressly limited to unleased or 1,000-acre parcels. Such limitation, if

> intended, would appropriately be expressed by inserting after the word 'exchange' the words 'of parcels of not over 1,000 acres of unleased land.'"

In this the learned justice seemed to require that a proviso should contain a complete proposition within itself. But ordinarily a proviso gathers its full meaning from the preceding subject-matter, and is not expected to be able to stand without the support of that subject-matter.

Again he says (Tr., p. 26):

> "There are several reasons why such unexpressed limitations would not be implied. They obviously would be inapplicable to the cases of defective titles or legal or equitable land claims mentioned in the second proviso of the same paragraph, as well as to cases of compromise mentioned in the first proviso."

We submit that while in our view not material here, it is by no means clear that the limitations referred to are inapplicable to the matters of defective titles, equitable claims, or compromises.

The land act of 1895 (Revised Laws, Chap. 22, Ballou's Compilation, Civil Laws, 1897, Chap. 17), was enacted by the legislature of the provisional government of Hawaii two years after the overthrow of the monarchy. During the latter years of the kingdom, many and loud were the complaints made against favoritism, abuses, and mismanagement displayed in the administration of the public lands.

Referring to the matter of public lands, and with special reference to the act of 1895, with which we are dealing in this case, President Dole, in a message sent to the legislature of the Republic of Hawaii on June 12th, 1895, in part, said:

> "In view of the fact that a large part of our permanent population is in a measure prejudiced, both in its chances of enjoying the comforts and beneficial influences of domestic life for want of homes, and lands for cultivation under secure title; and also in view of the evident need of the country for a class of small

landholders, owning and cultivating their respective holdings, as a basis of national prosperity and a desirable factor in our political growth, I commend to your consideration a liberal policy in the administration of public lands, whereby industrious persons with small means may have special opportunities of permanent holdings, and the disposition of large tracts of land for sale or for lease on long terms, shall be discouraged. * * * For want of a land policy heretofore, carried out in legislation favoring such a settlement of public domain, the difficulties of acquiring small holdings have been almost prohibitive to persons of small means. The homestead law of 1884 made a beginning, and has furnished valuable experience, but it is inadequate to the work which is now demanded from social, material, and political standpoints. * * * A bill elaborating such a land policy as outlined above, will be submitted to you by the Minister of the Interior. The foregoing recommendation in regard to the public lands is suggested, not only in relation to residents, but also as an inducement to the immigration of a desirable class of settlers from America and other countries."

The act of 1895 was designed to curb executive discretion, and intended to encourage the settlement and homesteading of the public lands by *bona fide* settlers by requiring a conservative and businesslike parcelling out of the lands in limited areas on favorable terms and under various plans of disposition, with the hope of preventing, as far as possible speculation and land grabbing. The sale, lease, or other disposition of public land in large tracts to a favored few, a cause of complaint of long standing, was undoubtedly a principal consideration entering into the enactment of the statute.

It, therefore, does no violence to either the spirit or language of the act to hold that the limitations as to area and existing leases were intended to permeate the whole of section 276, and to extend to the issuance of patents in exchange, or by way of compromise, and to quitclaim deeds for perfecting defective titles, or in cases of claims to the use of lands. The

intention of the legislature being that in all such cases where the area involved exceeded the 1,000-acre limit, or where the matter was complicated by existing leases, possibly involving rights of third parties, the executive officers should have no authority, and the moving party should seek relief from the legislature itself.

On occasions the legislature of Hawaii has adjusted such matters by special act, whereof examples are given in the Appendix to this brief.

Again the court's opinion says (Tr., p. 26):

> "As the earlier act, Sec. 254, R. L., contains no limitation to unleased or 1,000-acre parcels in cases of exchange, compromise, etc., it would be reasonable to expect that if such limitation were intended in the later act it would be expressed."

Any force that might have existed in this argument is removed by the fact that the superintendent of public works, to whom is confided the powers contained in section 254, has the control and disposition of only small parcels of land, most of which are in the actual use and occupancy of public buildings and government works, parks, roads, etc., as appears from section 262, Rev. Laws, which provides as follows:

> "*Provided, however,* That this chapter shall not apply to the following classes and descriptions of land, the property of the government, all of which shall remain under the control and management of the superintendent of public works.
>
> "Town lots, sites of public buildings, land used for public purposes, roads, streets, landings, nurseries, tracts reserved for forest growth, and conservation of water supply, parks, and all lands which may hereafter be used for public purposes. All land hereafter reserved by the commissioner for public purposes, shall thereupon at once pass under the control and management of the superintendent of public works."

The limitations imposed by the statute in connection with the large areas of agricultural and pastural lands placed under the jurisdiction of the commissioner of public lands, existed inherently as to the lands within the control of the superintendent of public works, or formerly, the minister of the interior.

It is also held in the majority opinion (Tr., p. 27) that the restriction of sales at auction of not over 1,000-acre parcels does not prevent the same person from becoming purchaser of any number of parcels, and it is suggested that the government land on Lanai might, if the leases were surrendered, be exchanged in 1,000-acre parcels. This may be conceded to be true, but the limitation as to area would give an opportunity, at least, to others than the one favored individual to make a purchase or an exchange. As to the suggested surrender of the leases, in our opinion there is no authority vested in the commissioner of public lands to accept a surrender of any lease duly executed pursuant to statutory provisions.

Chief Justice Frear held (Tr., p. 31):

> "That these provisos were intended as grants of additional general powers and not mere modifications of powers conferred in the body of the section is further shown by the fact that they are powers of a different kind. The body of the section relates solely to sales and provides that sales be at public auction for cash, or part credit, and part cash, and contains limitations as to the character and area of the lands that may be sold, while the provisos have nothing to do with sales, but, on the contrary, necessarily exclude, either expressly or by implication, all of the three requisites of a transfer under the body of the section."

We submit that the correct view to take of section 276, is that that section relates to the absolute disposition of the fee of public land as distinguished from mere leases or leases coupled with the right of purchase under conditions of resi-

dence, etc., as provided for in other sections of the act, and that such disposition of the fee may be for cash, or part credit, by exchange, or by quitclaim deed, but always subject to the limitations as to area, and that the land shall not be under lease, as stated in the body of the section.

The Chief Justice also raised the point as to why the 1,000-acre limit should be adopted for the proviso in question rather than the 600-acre limit (Tr., p. 32). The reason for this plainly is that it is the 1,000-acre limit that is prescribed in regard to the disposition of the fee of lands by patent for an immediate, as distinguished from a deferred, consideration, and until payment whereof no patent can issue as the statute expressly provides.

The majority of the Supreme Court of Hawaii would relegate to obscurity Section 279 of the Revised Laws, which purports to prescribe the only conditions under which the commissioner can deal with lands under lease. Yet this is in direct conflict with a fundamental rule of statutory construction.

> "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently each part or section should be construed in connection with every other part or section and so as to produce a harmonious whole."
>
> 2 *Lewis Sutherland Stat. Con.*, Sec. 368.
> *Bernier v. Bernier*, 147 U. S. 246.
> *Bank v. United States*, 19 Wall., 227.

That section (279) provides as follows:

> "Previous to the last two years of the term of any general lease the commissioner shall with the approval of the governor decide in regard to the premises covered by such lease whether the same shall be demised under a new lease or be reserved by the government for other disposition thereof under this chapter, or for forest improvements, or for the development of water supply, or other public uses or otherwise, or whether a part should be so reserved

> and a part demised under a new lease and shall promptly notify the lessee of such lease of the nature of such decision."

Speaking directly to this point, Mr. Justice Wilder, in his dissenting opinion below (Tr., 35), we submit, correctly and clearly reasons to such conclusion thus:

> " If there is a power to exchange land under lease, " what becomes of section 279 of the Revised Laws, " also a part of the land act of 1895, which by its " terms purports to give to the commissioner of pub- " lic lands the only power he has in regard to the " disposition of land under a general lease? There " is no conflict between sections 276 and 279 if the " power of exchange is limited to lands not under " lease, otherwise there is. Every construction which " leads to a conflict between two sections in the same " act should be avoided (*Pratt v. Holloway*, 17 Haw., " 544). See also *Bernier v. Bernier*, 147 U. S., 246, " where it is said that 'It is a general rule, without " 'exception, in construing statutes that effect must " 'be given to all their provisions if such a construc- " 'tion is consistent with the general purpose of the " 'act and the provisions are not necessarily conflict- " 'ing. All acts of the legislature should be so con- " 'strued, if practicable, that one section will not de- " 'feat or destroy another, but explain and support it. " 'When the provision admits of more than one con- " 'struction that one will be adopted which best serves " 'to carry out the purposes of the act.' "

The construction which we contend should be given to section 276 would bring these two provisions of the statute—sections 276 and 279—into complete harmony, and in a manner conforming to the spirit of the whole act.

The *policy* of the law as expressed in section 276 is clearly to prevent the offering or sale to any one person in unlimited areas. Otherwise the language "in parcels of not over one thousand acres" would not have been used. The prohibition against the offering or sale of *any* public lands

under lease is equally plain. That was matter of plain necessity. Lands under lease could not be patented, for by patent is, of course, meant a grant of the *fee*, which implies in law both the assurance and conveyance of the possession and right of possession, both being necessary and constituent elements of a grant in fee. It was upon this strong ground that the Circuit Court rested its decision in awarding the original injunction (Tr., p. 16, bottom). The principle has equal application in respect of exchange authorized by the first proviso to the section because in so authorizing issue of "land patents" in exchange "for deeds of private lands," &c., the evident result and purpose of the proviso was to issue such land patent at once and for the whole fee. As lands under lease could not be so sold and granted it is obvious that lands so situate could not be lawfully exchanged. The exception of lands "under lease" hence necessarily applies in each instance, for the legal infirmity against patenting such lands is present in each.

Nor is the argument here made affected by the suggestion found in the opinion of Frear, C. J. (Tr., 30), that the *second* proviso authorizes quitclaim deeds from the government to remove a cloud from the title of a private owner. A quitclaim deed is not a patent. It does not grant the fee as does a patent, but is merely the conveyance of all interest (if any) which the grantor may have. A patent is a solemn instrument of grant, while quitclaim is but disclaimer of any interest in the land.

To the argument that the words "without an auction sale" found in the proviso are mere surplusage and can hence be disregarded, we answer in the words of the dissenting opinion below (Tr., p. 34):

> "If the intention was to allow a power of exchange not limited to quantity or kind of land, why were the words 'without an auction sale' specifically inserted in the proviso as being the only prerequisite not necessary to the issuance of a land patent in case of an exchange? To construe the proviso as authorizing an

unlimited power of exchange requires the practical elimination of the words 'without an auction sale' and treating them as surplusage. That such a construction is not justified see Endlich Int. Stat., 23.

"It is argued that there is no limit to the right to exchange mentioned in section 276 either as to the amount or kind of land because there is no limit to the right of exchange mentioned in section 254, R. L. That argument is not sound for the reason that at the time of the passage of section 254 there was an absolute right to lease, sell, or otherwise dispose of the public lands in any amount and whether leased or unleased, and also for the reason that the section which preceded and to which section 254 had reference (sec. 253, R. L.), imposed the one condition of a public auction sale in cases of transfers of government lands, and that one condition was expressly not to be imposed in cases of exchange."

Mr. Justice Wilder in his dissenting opinion again well said (Tr., p. 34):

"The power contended for by the commissioner of public lands is undoubtedly contrary to the spirit of the land act of 1895, which included this section 276, and which requires dispositions of public lands to be in small areas, undoubtedly for the reason of encouraging settlers and homesteaders and also of allowing others than the very wealthy the privilege of acquiring portions of the public domain. The majority recognizes that this exchange is contrary to the spirit of that act. In construing a doubtful provision of an act the act as a whole and its reason and spirit may be considered."

The learned justice then proceeds to demonstrate that to hold that the power to exchange is without limit is to provide for the complete nullification of the main purpose and object of the statute (Tr., p. 35).

In support of our contention as to the proper construction to be put upon section 276, we rely on the well-established rule that provisos are ordinarily intended to qualify or re-

strain the generality of the immediately preceding subject-matter, carving out and excepting therefrom some special matter, *the specially carved-out matter in the proviso under review being the requirement of an auction sale in cases of exchange of lands.*

> "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."
>
> *Minis v. U. S.*, 15 Pet., 423, 445.

Approved in

> *Thaw v. Ritchie*, 136 U. S., 519.
> *Austin v. U. S.*, 155 U. S., 417.

> "The first question is whether the proviso which is found in the first section of the act of 1843 applies to the whole act, or is to be confined to the section to which it is attached. As the natural and appropriate office of a proviso is to restrain or qualify some preceding matter, we think, upon sound principles of construction, it should be confined to what precedes, unless it is clear that it was intended to apply to subsequent matter."
>
> *Rawls v. Doe*, 23 Ala., 240, 248.

Approved in

> *Pearce v. Bank*, 33 Ala., 693.
> *Carroll v. State*, 58 Ala., 396.
> *De Graff v. Went*, 164 Ill., 485.

> "The natural and appropriate office of a proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter. It should be construed with reference to the immediately preceding parts of the clause to which it is attached, and will be so restricted, in the absence of anything in its terms, or the subject

it deals with, evincing an intention to give it a broader effect."

State v. Bellew, 85 Wis., 189, 195.

"The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it unless it clearly appears to have been intended to apply to some other matter. It is to be construed in connection with the section of which it forms a part, and it is substantially an exception. If it be a proviso to a particular section it does not apply to others unless plainly intended. It should be construed with reference to the immediately preceding parts of the clause to which it is attached. In other words, the proviso will be so restricted in the absence of anything in its terms, or the subject it deals with, evincing an intention to give it a broader effect."

2 *Lewis Sutherland Stat. Con.*, Sec. 352.
Boynton v. People, 166 Ill., 64.

"This view also harmonizes with the acknowledged rule of construction that a proviso will generally be considered not to enlarge, but rather to restrain, qualify or explain the clause to which it refers."

Rice v. Keokuk, 15 Iowa, 579, 583.

See also

Com. v. Charity Hospital, 199 Pa. St., 119.
Van Reipen v. Jersey City, 58 N. J. L., 262.

"Passing from these considerations to another, which necessarily brings under review the second point of objection to the charge of the court below: we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those

> who set up any such exception, must establish it as being within the words as well as within the reason thereof."
>
> *U. S. v. Dickson*, 15 Pet., 141, 165.

> "The rule is that a proviso is to be strictly construed, and that it takes no case out of the enacting clause which is not fairly within the terms of the proviso. United States *v.* Dickson, 15 Pet., 141. This will justify an interpretation which gives the narrowest possible effect to the proviso which is consistent with a reasonable reading of its language."
>
> *Clark Thread Co. v. Kearny*, 55 N. J. L., 50, 54.

> "The general rule of law is, that a proviso carves special exceptions only out of the body of the act: and those who set up any such exception must establish it, as being within the words as well as the reason thereof."
>
> *Ryan v. Carter*, 93 U. S., 78, 83.

If the proviso is to be confined to what precedes it, and will not be deemed intended from doubtful words to enlarge or extend the provision on which it is engrafted, it should be held that the proviso here in question is limited to the subject of the provision to which it is attached, that is, to public lands not under lease in parcels of not over 1000 acres.

The general beneficial purpose of the statute was to forbid the transfer of the public land in parcels of over 1,000 acres and to require such parcels to be sold at auction. That policy, which should be held to control the proviso, can be fully effectuated only by eliminating the requirement of an auction sale in cases of the exchange of land.

A construction which permits of an exchange of over 47,000 acres of land, cannot, we think, be said to be in accord with the beneficial purpose of the statute.

In the brief for defendant in error it is urged that as "sale" and "exchange" in real property law designate different

transactions having different legal effect, hence the proviso here in question "cannot be considered as limited to the same "subject as the rest of the section, and to that extent is not "within the general rule." Hence it is argued that as in exchange of realty neither money nor credit is involved, it cannot be said that the proviso here is in any form related to the preceding general provisions of section 279.

Two answers are obvious:

1. The words "without an auction sale" found in the proviso cannot be treated as surplusage. They mean something and cannot be treated as mere surplusage and accordingly excluded in order to reach *one* of *two* differing conclusions. All reason and authority forbid adoption of such a view if a reasonable construction of the statute is possible, consistent with their retention and which accords with the general legislative intent.

In *Newhall v. Sanger*, 92 U. S., 761, 765, this court said:

> "This section expressly excludes from pre-emption "and sale all lands claimed under any foreign grant "or title. It is said that this means 'lawfully' "claimed; but there is no authority to import a word "into a statute in order to change its meaning."

Nor, we submit, is there authority to *exclude* words from a statute in order to change its meaning. That is precisely what it is here sought to do.

2. The cardinal rule of interpretation requires effect to be given to the general intent of the legislature if that can be discovered within the four corners of the act. That general intent here is too plain to require further extended discussion. *Limitation* of the disposal of the public domain, and of that portion *not under lease*, is the plain, dominant and general intent of the main provisions of the section 276. Nothing in the proviso enlarges that main, controlling intent. "Exchange" of the fee title to the public domain by patent discloses no legislative purpose to authorize such exchange in unlimited quantity by *one* transaction, or invest title (as

here) in one individual to nearly 50,000 acres comprising much the larger area and *all* of the public domain upon one of the principal islands of the Hawaiian group

Nor can it be said that the words "without an auction sale" are the only words of limitation found in the preceding general body of the enactment and applicable here. The words "*not under lease*," are words of limitation. Manifestly, if *sale* of leased lands was forbidden, exchange of such leased lands is not authorized by any language found in the proviso That leased lands could not be sold and patented in fee is clearly recognized by section 276. If when the legislature thus properly inhibited sale and patent of such leased lands how can it be said that it intended leased lands could be *exchanged* and patented in fee? We here again cite to the court the clear and convincing language found in the dissenting opinion of Mr. Justice Wilder (Tr., 35) as demonstrating that only by our construction can the provisions of section 279 respecting leased lands be harmonized with the provisions of section 276 in this regard.

Again, as having plain bearing on the question here involved, we refer to section 89 of the Organic Act of Hawaii, which provides that the wharves and landings shall remain under the control of the Territory, and that the Territory shall enjoy the revenue therefrom and keep same in good condition for the use and convenience of commerce.

The bill alleges that the land of Kamoku, containing about eight thousand acres of good grazing land, has about three miles of sea frontage and a good harbor, and that the land of Paomai, which is good grazing land, has about five and a half miles of sea frontage and a fair harbor or landing. Yet by this exchange it is proposed to transfer the entire government holdings on the Island of Lanai, including these harbors and landings, to private ownership.

II.

It is urged that as the discretionary action of executive officers cannot be reviewed by the courts, and as the court below has ruled that power to exchange lands was conferred upon such officers the manner or extent of its exercise is not here open to question. Such argument wholly begs the question. The foundation of the bill is the full averment that an unlawful exchange is proposed and in the manner therein set out. The demurrer admits the facts pleaded. Thereon the question of executive power under the statute necessarily and distinctly arises. The averment is that the officers are acting without the statute and in violation thereof. Admission of a power of exchange conferred under section 276 does not carry the further admission that *any* exchange is authorized. The exercise of discretion *within* the statute is one thing; its exercise in plain violation of the statute (and in the manner the bill avers) is a wholly different matter. If discretion may not be enjoined plain violation of law may be. The cases cited against us do not hence apply. *Contra*, our case is plainly analogous to those wherein injunction bills have been entertained to enjoin public officers from doing unlawful acts to the prejudice of taxpayers and citizens. A number of such cases are cited upon our brief (p. 15) in opposition to the pending motion to dismiss. Among them will be found *Crampton v. Zabriskie*, 101 U. S., 601, wherein (p. 609) the court said:

> "Of the right of resident tax-payers to invoke the "interposition of a court of equity to prevent an "illegal disposition of the moneys of the county or "the illegal creation of a debt which they in common "with other property-holders of the county may "otherwise be compelled to pay, there is at this day "no serious question. The right has been recognized "by the State courts in numerous cases; and from

> " the nature of the powers exercised by municipal cor-
> " porations, the great danger of their abuse and the
> " necessity of prompt action to prevent irremediable
> " injuries, it would seem eminently proper for courts
> " of equity to interfere upon the application of the
> " tax-payers of a county to prevent the consummation
> " of a wrong, when the officers of those corporations
> " assume, in excess of their powers, to create burdens
> " upon property-holders. Certainly, in the absence
> " of legislation restricting the right to interfere in
> " such cases to public officers of the State or county,
> " there would seem to be no substantial reason why
> " a bill by or on behalf of individual tax-payers
> " should not be entertained to prevent the misuse of
> " corporate powers. The courts may be safely
> " trusted to prevent the abuse of their process in
> " such cases. Those who desire to consult the lead-
> " ing authorities on this subject will find them stated
> " or referred to in Mr. Dillon's excellent treatise on
> " the Law of Municipal Corporations."

Moreover the class of cases cited against us are all of private right wherein the courts have said that while executive discretion may not be enjoined after the officer has acted judicial review and correction of any errors of law involved therein may then be had at the suit of the interested party. But here the suit is of a public nature. It is invoked to prevent a public wrong. The injury alleged is immediate and irremediable. The distinction is obvious.

III.

It is urged by defendant in error that the construction given the land act of Hawaii by the Supreme Court below is binding upon this court. But the cases cited to support such contention are all those coming from State courts wherein this court has reiterated the settled rule that the consistent construction of a State statute by the highest court thereof will be accepted here. The distinction between State and

territorial statutes in this regard is, however, obvious. Assuming *pro argumento* that this is not a statute of the United States, yet the power of review here is undoubted. It is true that in *Sweeney v. Lomme*, 22 Wall., 213, and *Armijo v. Armijo*, 181 U. S., 561, the court accepted the ruling of the territorial Supreme Court construing a local statute in matters of practice. But in *Copper Queen Mining Co. v. Arizona Board*, 206 U. S., 474, 479, the rule was thus stated:

> "On the other hand, while this court cannot refuse
> " to exercise its own judgment, it naturally will lean
> " toward the interpretation of a local statute adopted
> " by the local court."

IV.

It is further said that even if this is a Federal statute no right of review exists in this court (*a*) because no right of defendant in error was denied, nor the validity of the statute denied by the decision below, and (*b*) because neither the plaintiff in error nor the public would be injured by the proposed exchange.

A.

The public lands in question stood as the property of the United States. They could only be disposed of by authority of Congress. The organic act *in terms* provided (section 73) that authority. It made the laws of Hawaii in this regard the laws of Congress and continued them in force "until Congress shall otherwise provide." Hence their subsequent change or repeal was wholly within the power of Congress.

Now the bill avers that the defendants have no legal right or authority to make, consent to or approve "of said threatened and intended exchange of said Lanai lands." Obviously that averment rested upon the public statute. We insist it was and is for all purposes a Federal statute. The right to enjoin the sale was hence predicated upon the statute as a Federal law. The court below has so construed the stat-

ute as to deny the right—the foundation on which the plaintiff in error sought relief. To say that no right involving a law of the United States was not denied, is in effect to say that plaintiff in error appearing for himself and the public (the only possible way in which the threatened wrong could be judicially prevented), claiming that under this statute the threatened exchange was unlawful and property of the United States was about to be wrongfully transferred, did not assert and have denied a right resting upon and involving Federal law. Under any other view the wrong (if existing) would be consummated. The case is perhaps peculiar in this regard, but the plain circumstances make it so, and we submit the right of review should not be denied upon the technical grounds which are here so earnestly urged against us.

B.

The contention that plaintiff in error was not injured by the threatened exchange and hence could not maintain his bill is based upon the assumption that as the Territory would receive lands of equal value in the transaction, no property injury could result to him nor to the public. But if the plaintiff in error is right in his contention upon the law, the transaction is illegal. Property injury is not essential to support the power of equity to give relief. The cases cited in our brief in opposition to the motion to dismiss (p. 15) demonstrate this. Thus in *Winn v. Shaw*, 87 Cal., 631, 637, it was held:

> "It is further urged that there is no allegation or "finding that the county or plaintiff will suffer any "damage if the land of Hodges is accepted and paid "for; that it does not appear that its value is any less "than the price agreed to be paid for it. But the "question here is not whether the county will profit "or lose by the transaction. If the law forbids the "making of such a contract unless preceded by publi- "cation of the notice of intention to make it, that

> " must be the end of the matter, as in such case there
> " can be no legal liability on the part of the county to
> " pay and the object of this action is to prevent an
> " illegal payment of money."

Such right thus asserted is recognized by this court in sustaining jurisdiction to review cases from the State courts. Thus, in *Nutt v. Knutt*, 200 U. S., 12, 19, it was said:

> " A party who insists that a judgment cannot be
> " rendered against him consistently with the statutes
> " of the United States may be fairly held, within the
> " meaning of section 709, to assert a right and im-
> " munity under such statutes, although the statutes
> " may not give the party himself a personal or
> " affirmative right that could be enforced by direct
> " suit against his adversary. Such has been the view
> " taken in many cases where the authority of this
> court to review the final judgment of the State
> courts was involved. *Logan County Nat. Bank v.*
> *Townsend*, 139 U. S., 67, 72; *Railroads v. Rich-*
> *" mond*, 15 Wall., 3; *Swope v. Leffingwell*, 105 U. S.,
> " 3; *Anderson v. Cackins*, 135 U. S., 483, 486; *Mc-*
> *" Nulta v. Lochridge*, 141 U. S., 327; *Metropolitan*
> *" Bank v. Clagett*, 141 U. S., 520; *McCormick v.*
> *" Market Bank*, 165 U. S., 538, 546; *California Bank*
> *" v. Kennedy*, 167 U. S., 362."

The rule here applicable is concisely stated in *High on Injunctions*, Vol. 2, Sec. 1241, thus:

> "SEC. 1241. *Distinction Between Acts within Corporate Powers and Acts Ultra Vires.*—But the restrictions thus placed upon equitable interference with the action of municipal corporations do not extend to cases where the act sought to be enjoined is in excess of the corporate power, but are limited to cases of a conceded jurisdiction, within the bounds of which the municipal power is acting. And while, as is thus shown, equity will not enjoin the action of municipal corporations while proceeding within the limits of their well defined powers as fixed by law, it has undoubted jurisdiction to restrain them from acting in

excess of their authority and from the commission of acts which are *ultra vires*. In illustration of this doctrine, where by act of parliament certain lands are directed to be put and kept in proper condition for purpose of public recreation, the municipal authorities having them in charge may be perpetually enjoined from devoting the lands to another and different purpose foreign to that contemplated, as the holding of a cattle fair, such act being entirely beyond the powers conferred upon them by law. And where a municipal body, such as a board of works, entrusted with certain powers for the attainment of certain results, are proceeding in excess of their powers to pull down complainant's buildings, they may be restrained by injunction, their action being *ultra vires*."

Mr. Dillon, in his work on *Municipal Corporations*, 3d ed., Vol. 2, sections 906-922, discusses in much detail this proposition and the decided cases thereon. In section 914 he pertinently says:

"In this country, the right of *property holders or taxable inhabitants* to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers, such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property, under circumstances presently to be explained, has been affirmed or recognized in numerous cases in many of the States. It is the prevailing doctrine on this subject. It can, perhaps, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct, and adequate preventive relief against their abuse. It is better that those immediately affected by corporate abuses should be armed with the power to interfere directly in their own names than to compel them to rely upon the action of a distant State officer. * * * "

And in section 915 the doctrine is made clearly analogous to the right of stockholders in a corporation to thus intervene, upon the refusal of the corporation to bring an action. Here the Territory, by its officers, was the admitted actor in the threatened exchange. If such exchange was unlawful, then no judicial remedy was available, except at the suit of private persons. And the right of the individual to thus sue under such conditions was settled in Hawaii by a number of cases which are cited in our brief in opposition to the motion to dismiss (pp. 14-15), among them *Lucas v. A. H. E. & C. Co.*, 16 Haw., 80, wherein the court expressly ruled that:

> "It is not necessary that the plaintiff should show "actual damage to himself and to all others similarly "situated, as is contended by the assistant Attorney "General."

V.

It is urged in the brief upon the motion to dismiss the writ and repeated by opposing counsel upon their brief on the merits, that as the transaction was closed by the actual exchange of the lands immediately upon the decision of the Supreme Court below dismissing the bill, no power of review exists in this court. It is true that instantly, and indeed on the same day the Supreme Court below announced its decision dismissing the bill the exchange was consummated. Twelve days later the complainant sought an appeal to this court and asked that the temporary injunction order be continued pending the determination of the cause in this court. The defendant in error resisted the motion for such continuance, upon the ground that the transaction had been consummated. The court's opinion upon that proceeding is found in the record (Tr., pp. 36-37). While it denied the motion to continue the injunction the court's comments on the transaction are pertinent and interesting. Appeal to operate as a supersedeas was within the right of the complainant and the manifest proprieties

of the occasion. We must take sharp issue with opposing counsel here upon the contention that this court has no jurisdiction to hear and determine the cause because of the precipitate action of the defendant in error in thus consummating the exchange. In the brief in opposition to the motion to dismiss we have briefly discussed the point (pp. 16-17). We do not here burden the court with more extended reply beyond the pertinent suggestion that review, when authorized in this court, is effective in all cases. If a judgment for land or money is recovered, and the judgment is reversed in this court, it matters not that execution has issued and been satisfied on the judgment below, or that the land has passed into the possession of the successful litigant there. The effect of the judgment in this court is to give judgment over, or other effective restitution.

Bank of United States v. Bank of Washington, 6 Pet., 8.

Morris v. United States, 8 Wall., 507.

Re Morris, 9 Wall., 605.

Conrad v. United States, 20 Wall., 115.

So here, reversal of the judgment below must determine that this exchange had not been legally made, which final determination in this court would hence be followed by further proceedings in this cause, or, more properly, perhaps the direct suit of the Territory. We submit, however, that such reversal, with the usual declaration that the cause is remanded for such further proceedings as are not inconsistent with the opinion thus rendered, is all-sufficient here, the form of such subsequent proceedings not being pertinent matter for present argument.

We submit that the decree below should be reversed.

A. G. M. ROBERTSON,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
Attorneys for Plaintiff in Error.

APPENDIX.

Chapter 10, Session Laws of 1882, provides as follows:

"An Act to Authorize the Commissioners of Crown Lands to Convey Certain Portions of Such Lands to Claus Spreckels in Satisfaction of all Claims he May Have on Such Lands.

"WHEREAS, Claus Spreckels claims to be entitled to an undivided moiety of the lands known as Crown Lands, by virtue of a conveyance from Her Highness Ruth Keelikolani; and

"WHEREAS, it is expedient and advisable that such claims should be satisfied or compromised; therefore,

"Be it enacted by the King and the Legislative Assembly of the Hawaiian Islands in the Legislature of the Kingdom assembled:

"SECTION 1. The Commissioners of Crown Lands are hereby authorized and empowered to make proper deeds of assurance to the said Claus Spreckels, of the several lands specified in the schedule hereto, in full satisfaction and discharge of all claims the said Claus Spreckels may have or claim in the said lands known as Crown Lands.

"SECTION 2. Before receiving such deeds or assurances the said Claus Spreckels shall, by proper assurance, convey, relinquish and quit claim to the said Commissioners of Crown Lands, all his right and interest in and to the residue of the said Crown Lands.

"SECTION 3. The Minister of the Interior is hereby authorized to prepare and deliver to the said Claus Spreckels a Royal Patent for the said lands, to be conveyed to him.

THE SCHEDULE.

"The Ahupuaa of Wailuku, in the Island of Maui, with the Ilis therein or thereunto belonging, and estimated to contain twenty-four thousand acres or thereabouts."

Act 53, Session Laws of 1896, the preambles and first section of which provided as follows:

"An Act to Provide for the Permanent Settlement of Kapiolani Park.

"WHEREAS, the Kapiolani Park Association, a chartered corporation of the Hawaiian Islands, holds certain premises in the District of Honolulu, including the lands known as the Kapiolani Park and certain lots adjacent thereto, by lease from the Crown Commissioners having upwards of twenty-two years to run, and a lease from Allen Herbert, having upwards of ten years to run, and by a deed of conveyance from the trustees of the Lunalilo estate recorded in the Hawaiian Registry of Deeds in Book 83, pages 135, and following:

"AND WHEREAS, William G. Irwin is now the owner of the fee of the premises leased by said Allen Herbert as aforesaid;

"AND WHEREAS, a number of house-lots within said premises and on the outskirts of the said park have been laid out by said association, and by it leased and sublet to persons, some of whom have improved and occupied the same, the said William G. Irwin now holding under such leasing and sub-leasing thirty-seven of said lots, to wit: nineteen on the beach and eighteen mawka, the aggregate area of said thirty-seven lots being 10.02 acres;

"AND WHEREAS, the said William G. Irwin has proposed to the Executive Council to convey that part of his said fee simple premises now under lease to the Kapiolani Park Association that lies within the park proper (except 35-100 of an acre thereof reserved by him), containing 25.65 acres, to the Government upon the consideration that the Government shall by sufficient proceedings cause the park proper, that is to say, all the said premises heretofore known as Kapiolani Park, and used as a public park, except as aforesaid, to be permanently set apart as a free public park and recreation ground forever, and also shall without further consideration or cost furnish him, the said William G. Irwin, a fee simple title to the thirty-seven lots, held by him as aforesaid, and shall also surrender to him, the said William G. Irwin, the lease upon that portion of his said fee simple land lying outside of the boundaries of the park proper;

"AND WHEREAS, the said Association is ready to do all things necessary for it to do to carry out the said permanent establishment of said park, including a surrender, release and conveyance to the Government of all its remaining interests and rights to all the premises aforesaid, subject only to the rights of third parties in the lots aforesaid, and delivery of all its tools, carts, and other personal property used in the care of said park; now, therefore,

"*Be it enacted by the Legislature of the Republic of Hawaii:*

"SECTION 1. The President, with the approval of the Cabinet, is hereby authorized to arrange with the said William G. Irwin and the said Kapiolani Park Association a plan to create the said Kapiolani Park into a permanent public park and recreation ground, and to accept a conveyance of the said 25.65 acres from the said William G. Irwin, and the surrender, release and conveyance from the Kapiolani Park Association aforesaid, subject to the rights of third parties in any of said lots, and to convey to said William G. Irwin the lease upon that portion of his said fee-simple land retained by him as aforesaid, and thereupon to convey the remainder of the premises, including the 25.65 acres and not including any of the said adjacent lots, by trust deed to six persons to be selected as hereinafter provided, and to their heirs and successors in trust forever, for the maintenance of a free public park; and to do all other acts and things necessary or incidental to the carrying out of this section."

In the Supreme Court of the United States of America.

OCTOBER TERM, 1908.

No. 109.

L. L. McCANDLESS,
Plaintiff in Error,
vs.
GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii,
Defendants in Error.

In Error to the Supreme Court of the Territory of Hawaii.

BRIEF OF DEFENDANT IN ERROR PRATT.

CHARLES R. HEMENWAY,
Attorney General of Hawaii
for Defendant in Error.

HENRY E. COOPER,
Of Co[illegible]

In the Supreme Court of the United States of America.

OCTOBER, 1908, TERM.

No. ------

L. L. McCANDLESS, Plaintiff in Error, vs. GEORGE R. CARTER, Governor of the Territory of Hawaii, and JAMES W. PRATT, Commissioner of Public Lands of the Territory of Hawaii, Defendants in Error.	IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF OF DEFENDANT IN ERROR PRATT.

STATEMENT OF CASE.

This suit was brought on December 14, 1906, in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, to obtain an injunction restraining the governor and the commissioner of public lands from exchanging for private lands certain public lands on the Island of Lanai having an area of 47,669 acres of which all but 1000 acres were held by one Charles Gay under five leases terminating respectively February 9, 1907, of 7400 acres; November 1, 1907, of 7900 acres; June 23, 1908, of 9000 acres; January 1, 1916, including the lands of Kamoku, area 8291 acres, and Poomai, area 9078 acres; and January 2, 1925, of 5000 acres, the total annual rentals being $1600. (Tr. p. 4.)

The bill avers that the commissioner threatens to and will exchange said public lands for other lands equal in value and that the governor threatens to and will approve of the exchange unless restrained and enjoined from so doing; that the governor caused the following notice to be published in the daily newspapers:

> "Lanai Lands. Notice is hereby given that having decided an Exchange of the Public Lands on the Island of Lanai to be advisable, the Commissioner of Public Lands is prepared to receive offers of other lands that are equal in value of those of Lanai, and of greater immediate service to the Territorial government, from any responsible person, up to and including Saturday, the fifteenth day of December, 1906. G. R. Carter, Governor. Executive Building, Honolulu, November 28, 1906;" (Tr. p. 5);

that the commissioner has no right or authority to exchange these lands for other lands of equal value or for any other lands and that the governor has no right or authority to approve of the exchange which is not by way of compromise or equitable settlements of rights of claimants, nor by way of exchange for parcels of land required for roads, nor for sites of government buildings, nor for any other government purposes; (Tr. p. 5); that the lands are of great value, the said land of Kamoku, containing about 8000 acres of good grazing land with about three miles of sea frontage with a good harbor, the land extending inland about six miles, having a value of $40,000; that the said land of Poomai is good grazing land having about five and one-half miles of sea frontage, including a fair harbor or landing, and extending inland over six miles, having a value of $37,000; that each of the other lands is worth more than $5000. (Tr. p. 6.)

The averments made upon information and belief are that

the commissioner threatens to make the exchange mentioned and those which relate to the value and condition of the lands. The jurat is in the usual form—that the plaintiff has read the complaint and knows its contents and that "the same are true, except as to those matters therein stated on information and belief, and as to those he believes it to be true." (Tr. pp. 6 and 7.)

Ex parte injunctions were issued upon the filing of the bill, (Tr. p. 8), but, on defendant Carter's motion, (Tr. p. 10), the injunction against him as governor was dissolved and the bill as to him dismissed on December 28, 1906, (Tr. p. 13), from which order no appeal was taken by plaintiff. (Tr. p. 13.) The commissioner's demurrer to the bill was overruled and his appeal from the decree overruling the demurrer was allowed. (Tr. pp. 19 and 20.) The demurrer raises the points (1) that the bill is insufficiently verified; (2) that the averments that the exchange is not authorized by law and that the commissioner ought to be enjoined state conclusions of law; (3) that the plaintiff has not shown any interest which entitles him to an injunction; (4) that the bill does not show that the commissioner is about to do any act in violation of law. (Tr. pp. 11 and 12.)

The Supreme Court of the Territory, on February 1, 1907, reversed the decree appealed from, sustained the demurrer of the defendant in error Pratt upon the fourth ground stated, and dismissed the bill. (Tr. pp. 22-35.) On February 1, 1907, the exchange now sought to be enjoined was consummated. (Afft. J. W. Pratt filed with Motion to Dismiss.)

Plaintiff in error subsequently, on February 13, 1907, moved in the Supreme Court of Hawaii for the entry of a decree in accordance with the decision rendered by that court and containing a provision that the bill should be retained and the preliminary injunction be continued in force for the purpose

of permitting an appeal to the Supreme Court of the United States. The Supreme Court, in deciding this motion, on February 15, 1907, (Tr. pp. 36-38), permitted the entry of a decree following their decision upon the merits, but refused to continue the injunction in force because the exchange of the lands sought to be prevented by plaintiff in error had been already made, subsequent to the decision of the Supreme Court and prior to the filing of plaintiff in error's motion.

On June 6, 1907, a writ of error was allowed. (Tr. pp. 1 and 2), based upon various assignments of alleged error by the Supreme Court of Hawaii, which are claimed to be against the rights, privileges and immunities of plaintiff in error, as set forth in the statutes of the United States, to wit, in Section 73 of "An Act to Provide a Government for the Territory of Hawaii." (Tr. pp. 40-42.)

Motions to dismiss the writ were filed by Walter F. Frear, Governor of Hawaii, succeeding George R. Carter, resigned, and by James W. Pratt, Commissioner of Public Lands. The motion to dismiss as to the Governor was granted, while that of the Commissioner of Public Lands was postponed for consideration together with the merits of the case. This motion is based on various grounds, chief of which is that no federal question is presented, and that the record does not show that the proper jurisdictional amount, to wit, $5000, is in controversy. The federal question claimed to appear in the record is the denial of some right, title, privilege or immunity given plaintiff in error by Section 73 of "An Act to Provide a Government for the Territory of Hawaii" (31 Stat. at Large, 141). No claim is or can be made that a federal question is presented on the ground that the validity of an authority exercised under either the United States or the Territory was questioned, and the decision was against the validity of such authority, for the decision of the Territorial Supreme Court was in favor of the

validity of the authority claimed by defendant in error under the land laws of Hawaii. No claim is or can be made that this Court has jurisdiction because of the fact that the sum or value of $5000 or more is involved in this controversy since it appears that the controversy arose out of a certain proposed exchange of a portion of the public lands for other lands "of equal value and greater immediate service." (Tr. pp. 6, 40 and 41.) Upon the merits defendant in error Pratt now submits that the decision of the Supreme Court of Hawaii sustaining his demurrer to the bill of complaint herein and dismissing said bill was correct, and that no error was committed by said court.

The first assignment of error having been abandoned (Plff.'s Brief on Motion to Dismiss, p. 6) the following propositions are now presented to this court for review:

First:—That the Supreme Court of Hawaii erred in reversing the decision of the Circuit Judge, in sustaining the demurrer of defendant in error, James W. Pratt, and in dismissing the bill of complaint. (Assignments 2 and 4, Tr. p. 41.)

Second:—That the Supreme Court of Hawaii erred in not decreeing that plaintiff in error was entitled to the injunction sought whether the act complained of would result in pecuniary loss to him or not. (Assignment 3, Tr. p. 41.)

Third:—That the Supreme Court of Hawaii erred in not decreeing the cancelation of the exchange made, and in not ordering a reconveyance of the lands so exchanged. (Assignment 5, Tr. p. 41.)

Fourth:—That the Supreme Court of Hawaii erred in not continuing the injunction in force pending a review of its decision by this court. (Assignment 6, Tr. p. 41.)

These matters will be considered in this order, and it will be shown that no error was committed by the Territorial Supreme Court.

ARGUMENT.

I.

THE HAWAIIAN SUPREME COURT DID NOT ERR IN SUSTAINING THE DEMURRER AND DISMISSING THE BILL.

On February 1, 1907, the Supreme Court of Hawaii rendered its decision in this case, the majority of the court holding that the decree appealed from should be reversed, and the demurrer sustained, (Tr. pp. 22 to 35) and a formal decree to this effect was accordingly entered on March 1, 1907, (Tr. p. 38). Error is now alleged to have been committed by the court in reaching this conclusion.

The chief question involved below was the matter of the construction of Section 276 of the Revised Laws (Sec. 17 of Ch. 26, S. L. 1895), and the same question is the principal one now before this court. If the construction given this section, by the Territorial Supreme Court, is, in the opinion of this court, correct, then the decree appealed from must be affirmed, for all other questions raised by this writ of error are subordinate to the question of construction, and whatever error may be found to exist regarding them is necessarily harmless error, since the rights of the parties depend upon the section under consideration.

A. The construction given Section 276 R. L. (Sec. 17 of Ch. 26, S. L. 1895,) by the Territorial Supreme Court is correct.

The section referred to reads as follows:

> "Sec. 276. Sales, at auction, exchange, etc. The commissioner may with the consent of the governor

sell public lands not under lease, in parcels of not over one thousand acres, at public auction for cash. Upon any such sale and the payment of the full consideration therefor, a land patent shall be issued to the purchaser.

"And he may, with such consent, sell public lands not under lease in parcels of not over six hundred acres, at public auction upon part credit and part cash, and deliver possession under an agreement of sale containing conditions of residence on or improvement of the premises sold, or of payment by instalments or otherwise of the purchase price, or all or any of such conditions.

"And in case of default in the performance of such conditions, the commissioner may, with or without legal process and without notice, demand or previous entry, take possession of the premises and thereby determine the estate created by such agreement. In case of such forfeiture, such land shall be sold at auction either as a whole or in parcels, for cash or on terms of time payments in the discretion of the commissioner; and if such sale shall result in an advance on the original price, the original purchaser shall receive therefrom the amounts of his payments to the government on account of purchase, without the interest and a pro rata share in such advance in proportion to the amounts of his payments. If such sale shall result, however, in a less price than the original, the amount returnable to him shall be charged with a pro rata amount of such decrease proportioned to the amounts of his payments. The treasurer is hereby authorized to pay the amount returnable to the outgoing tenant, upon the requisition of

the commissioner, out of any funds available for such purpose.

"Which agreement shall entitle the purchaser to a land patent of the premises upon the due performance of its conditions.

"The commissioner shall have authority to fix any upset price for all such sales for cash or part credit and part cash.

"All such sales shall be held in Honolulu, or in the district where the land to be sold is situated. Any person designated by the commissioner may act as auctioneer at such sales without taking out an auctioneer's license.

"PROVIDED, however, that land patents may be issued in exchange for deeds of private lands or by way of compromise upon the recommendation of the commissioner and with the approval of the governor without an auction sale, and further PROVIDED, that the governor may in his discretion upon such recommendation and approval, execute quitclaim deeds for perfecting the titles of private lands where such titles are purely equitable or where such lands are suffering under defective titles, or in cases of claims to use of lands upon legal or equitable grounds."

By this section authority is given the Commissioner of Public Lands, acting with the consent of the Governor, to do several distinct things. In the first place he is authorized to (1) sell public lands, (2) not under lease, (3) in parcels of not over one thousand acres, (4) at public auction, (5) for cash. This power is distinct and clear. It can be exercised only in the manner provided by statute, and under the conditions prescribed. In the second place authority is given the commis-

sioner to (1) sell public lands, (2) not under lease, (3) in parcels of not over six hundred acres, (4) at public auction, (5) for part credit and part cash, upon conditions of residence or improvement. This provision is likewise clear. When sales are made under the first power, since they are absolute, a patent is given the purchaser, but when sales are made under the second power, possession is given under an agreement embodying the required conditions of payment, and residence or improvement, a full compliance with which will entitle the purchaser to a patent. The section next makes provision for the action to be taken by the commissioner in cases of failure to perform these conditions. Then follows the portion of the section upon the construction of which this case depends. It is in the form of a proviso and reads:

> "*Provided,* however, that land patents may be issued in exchange for deeds of private lands or by way of compromise upon the recommendation of the commissioner and with the approval of the governor without an auction sale, and further *provided,* that the governor may in his discretion upon such recommendation and approval, execute quit claim deeds for perfecting the titles of private lands when such titles are purely equitable or where such lands are suffering under defective titles, or in cases of claims to use of lands upon legal or equitable grounds."

This case turns upon the construction of the first of these provisos as the action sought to be enjoined in this case was a proposed exchange of lands. It is however necessary to consider the entire section and particularly both of the statements made in the form of provisos in order to determine the true intent of the law.

Briefly stated, the position taken below by plaintiff in error

was that since in form this portion of the section was a proviso the power to exchange lands was limited by the conditions in the preceding portions of the section, i. e., to lands not under lease and to parcels of not more than one thousand acres, while the Territorial officials contended that, although in form a proviso, this portion of the section conferred a distinct and separate power to be exercised without regard to the preceding limitations. The Hawaiian Supreme Court sustained the view of the officials of the Territory.

It is, of course, a general rule that a proviso usually refers to what precedes it, its object being either to except something from the preceding provisions, to qualify their generality, or to exclude some possible ground for extending the preceding provisions beyond their purview, and it should be construed with reference to what immediately precedes it, unless it appears clearly to have been intended to apply to some other matter.

Plaintiff in error contended below that because a proviso in a statute ordinarily refers to the preceding matter, the limitations of the preceding portion of the statute are all necessarily included in the proviso. This contention, however, does not give full effect to the general rule stated above, because in construing statutes matters of form always yield to matters of substance. The cardinal principle is to determine and then give effect to the expressed intention of the law makers. In determining what the purpose and intent of the legislature is, the courts frequently disregard the relative position of clauses, the technical meaning of words, and the form of expression.

It is submitted that the portion of the section under consideration here, though in form a proviso, is not in fact to be considered such, but that it is to be considered as an independent portion of the section covering a distinct and separate subject.

It is to be noted that the proviso covers the matter of exchanges while the foregoing portion of the section covers sales. These subjects are inherently different, and the power to perform either act would not be considered to include the other. The word "exchange" has a clear and definite meaning in law, and designates a transaction whereby land is conveyed in consideration of the conveyance of other lands. So soon as any consideration enters into a transaction other than the mutual conveyance of land for land, the transaction becomes a sale.

3 Blackstone, 323;
7 Words & Phrases, 6301;
Long v. Fuller, 21 Wis. 121 at 124;
Hartwell v. De Vault, 159 Ill. 325 at 332;
Speigle v. Meredith, Fed. Cases No. 13227;
Picard v. McCormick, 11 Mich. 69.

It is, therefore, clear that the proviso cannot be considered as limited to the same subject as the rest of the section, and to that extent is not within the general rule. Not being so limited but covering a distinct subject the section must be construed so that effect is given to the language used, and it must be held to confer a power, i. e., power to make exchanges.

Since an exchange excludes, because of its nature, the limitations of a sale at auction for cash or credit, these limitations in the body of the section cannot apply to the power conferred in the proviso. There is therefore no reason for considering that the other limitations as to what may be sold, i. e., as to area and as to the absence of a lease, apply to exchanges. The express exclusion of one of the restrictions contained in the body of section, i. e., the auction, and the exclusion by necessary implication of two others, i. e., the sale for cash or part cash and part credit, certainly does not warrant the inclusion

by implication of the remaining two, and is a strong reason against such inclusion.

It is clear that the restrictions as to area and as to lands not under lease cannot be implied in the second proviso, for the power given to execute quitclaim deeds to perfect the title to private lands, from its very nature cannot be properly limited to lands not under lease or of a restricted area. If so limited it would fail to accomplish its object. Nor can it be contended in regard to this second proviso that such limitations are implied because of the express exclusion of the requirements of an auction sale for there is no such express exclusion. But if such restrictions are to be implied in one proviso they should likewise be implied in the other.

If the words "without an auction sale" had been omitted from the first proviso, as they were from the second, it is fair to say that no contention would have been made that the other restrictions contained in the body of the section were impliedly included. But such words add nothing to the meaning of the proviso because from its nature an exchange excludes all possibility of a sale, whether at auction or otherwise. The words are therefore surplusage, and to consider their presence as indicating that the other restrictions are included is to give them effect in a manner wholly beyond their true meaning, and also to impute to the legislature an intention to accomplish by an indirect and clumsy method what could easily have been done by a direct and clear statement.

Another objection to regarding the restrictions in the body of the section as applying to the power of exchange contained in the first proviso is that the power should be construed to be as broad as the object it is designed to cover, especially in the absence of a clearly expressed contrary intent. The chief object of the body of the section is to dispose of government lands, while the chief object of the proviso is entirely different,

it being in one case to acquire lands by an exchange and in other cases the carrying out of a compromise and the perfecting of faulty titles. It is apparent that to consider that exchanges were limited to lands of a restricted area and not under lease would in large measure prevent the carrying out of these objects. An exchange of lands of the greatest value to Hawaii might be rendered impossible if no more than one thousand acres could be given for such lands, or if land under lease could not be so used.

Still another reason in favor of the construction placed upon the section by the Hawaiian Supreme Court is found in the fact that the body of the section confers two distinct powers, as has already been pointed out. In exercising either power there must be a sale at public auction of lands not under lease. But with that the similarity ends. In the one instance sales can only be made for cash of parcels not exceeding in area one thousand acres, while in the other case the power is limited to sales of parcels not greater than six hundred acres in area, but such sales may be made partly for cash and partly on credit. As shown above, the terms of sale cannot apply to an exchange because of the inherent difference between the two transactions. But if it is to be considered that the restriction as to what may be sold is applicable to exchanges, then it is necessary to determine which of the two restrictions will be followed. There is no more reason for selecting the one thousand acre restriction than the six hundred acre limit; nor is the question at all simplified by saying that the greater certainly includes the less and therefore the greater should be taken. The two powers are distinct, and permit the disposal of lands in two separate ways on different terms. This court cannot select one of these restrictions as to area to the exclusion of the other, and in the absence of any expression of intention

on the part of the legislature it should be held that neither restriction can apply.

Since, therefore, it not only appears that the subject matter and object of the provisos are different in nature from those of the body of the section, but also that from the nature of the powers of sale conferred and the differences in the respective methods for the exercise of such powers it is impossible to reasonably consider the restrictions applying to either as also applying to the provisos, it is submitted that these provisos must be construed as distinct grants of power and as if made in a different section of the law.

The power to exchange is not in conflict with the spirit of the entire act for that act is drawn so as to cover many different matters. It is not its sole object to place land within ready reach of the small holder nor to dispose of the land by sales. And if these were the main objects the exercise of a power of exchange might be of importance in securing for these main purposes lands more suitable than any upon the list of public lands.

With the question of the policy of any exchange this court has nothing to do. And even if it may consider that the power of exchange contained in the proviso is dangerous because too broad and unrestricted, yet that is not an objection to the construction contended for. The question is solely as to the true meaning of the language used, and it is now urged that the construction of the section by the Territorial Supreme Court was correct. Nor does this construction of the section fail to give full effect to the general rule of construction which has been stated above. The intention of the law-making body, if plainly expressed, must be given the force of law no matter in what form it may be stated; the intention expressed is paramount to form.

C. & P. Telephone Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144;
Ga. R. & B. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377;
Stanley v. Colt, 72 U. S. 166, 18 L. ed. 509;
Gibbon v. Ogden, 9 Wheat. 199, 6 L. ed. 23;
Traders Nat. Bank v. Lawrence Man'fg. Co., 96 N. C. 289, 3 S. E. 367;
State v. Eskridge, 31 Tenn. 413, 414;
Farmers' Bank v. Hale, 59 N. Y. 53;
McDermut v. Lorilland, 1 Edw. Chan. 273, 276;
State v. Cain, 44 Mo. 283;
Castner v. Walrod, 83 Ill. 171, 179;
Carrol v. State, 58 Ala. 396;
Brace v. Solner, 1 Alaska 361;
Merwin v. Bd. of Com., 27 Colo. 169, 67 Pac. 285;
State v. Browne, 56 Minn. 269, 57 N. W. 659;
Cooley's Const. Lim., (7th ed.) 255.

The natural and appropriate object of a proviso being to restrain or qualify some preceding matter, it is confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter.

Lewis Southerland Stat. Const., 2 ed., Sec. 352;
Pearce v. Bank of Mobile, 33 Ala. 693;
Sutton v. People, 145 Ill. 279, 34 N. E. 420;
School District v. Coleman, 39 Neb. 391, 55 N. W. 1068;
Leader Print Co. v. Nichols, 6 Oklahoma 302, 52 Pac. 1001.

While a proviso will be so construed as to restrict it to what immediately precedes it, in the absence of anything in its terms or the subject it deals with evincing an intention to give it a broader effect, yet this is not an arbitrary rule to be enforced

at all events and is based upon the presumption that the meaning of the law-maker is thereby reached.

U. S. v. Babbitt, 1 Black 55, 17 L. ed. 94;
Freidman v. Sullivan, 48 Ark. 213;
State v. St. Louis, 174 Mo. 125, 73 S. W. 623;
Kings Lake Drainage, etc., Dist. v. Jamison, 176 Mo. 557, 75 S. W. 679;
Mayor, etc., v. Magruder, 34 Md. 381.

It has therefore been held that—

> "It does not necessarily follow that because the term 'provided' is used, that which may succeed it is a proviso though that is the form in which an exception is generally made to, or a restraint or qualification imposed on, the enacting clause. It is the subject matter of the succeeding words and not the form which determines whether or not it is a technical proviso."

Carrol v. State, 58 Ala. 396, 401;

And the word "provided" instead of limiting a preceding section may introduce an independent paragraph.

Ga. R. & B. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377;
Carrol v. State, 58 Ala. 396;
Stanley v. Colt, 72 U. S. 166, 18 L. ed. 509.

> "When from the context and a comparison of all the provisions relating to the same subject matter it is manifest that the object and intent were to give the proviso a scope extending beyond the section and an effect beyond the phrase immediately preceding, it will be construed as restraining or qualifying preceding sections relating to the subject matter of the pro-

viso or as tantamount to an enactment in a separate section without regard to its position and connection."

Wartensleben v. Haithcock, 80 Ala. 565, 1 So. 38, 40.

"While the position of the proviso in a statute has a great and sometimes a controlling influence upon the extent of its applicability, yet the inference from its position cannot override its plain, general intent."

Devin v. York City, 156 Pa. St. 359, 361; 27 Atl. 247.

In holding that the proviso in the section under consideration here conferred upon the executive officers of the Territory a power distinct and separate from the powers of sale contained in the body of the section, the Supreme Court of Hawaii, it is submitted, followed the rule of construction which controlled the decisions in the cases to which attention has above been called, and gave effect to the true intent of the law-makers.

B. The discretionary action of executive officers cannot be reviewed by the courts.

It having been shown above that the proviso under consideration conferred upon the commissioner of public lands acting with the consent of the governor, power to effect changes of land, and such power being unrestricted in express terms, it follows that such officers must exercise their own judgment and discretion as to the making of exchanges. There therefore was no error in the refusal of the Territorial Supreme Court to restrain by injunction, the exercise of the power to complete the proposed exchange in this case, in view of the conclusion reached by such court that power to exchange lands was conferred upon such officers.

The courts cannot interfere by injunction with executive officers in the discharge of their official duties, unless such

duties are purely ministerial, involving no exercise of judgment or discretion.

Litchfield v. Richards, 9 Wall. 575, 577, 19 L. ed. 681;
Carrick v. Lamar, 116 U. S. 426, 29 L. ed. 678;
Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62;
Cox v. United States, 9 Wall. 298, 19 L. ed. 579;
United States v. Guthrie, 17 How. 284, 15 L. ed. 102;
Kirwan v. Murphy, 189 U. S. 35, 54, 47 L. ed. 698, 705;
Boynton v. Blame, 139 U. S. 306, 35 L. ed. 186;
Brown v. Hitchcock, 173 U. S. 473, 43 L. ed. 772;
Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935.

C. But even if the construction placed upon Section 276 R. L. by the Hawaiian Supreme Court is incorrect in the opinion of this court, still this is not ground for reversal, for the construction placed upon a local statute by a local court is binding upon this court.

In the brief on the motion to dismiss filed by defendant in error Pratt in this case, it is argued that the land laws of Hawaii are local laws only and not statutes of the United States within the meaning of the provisions of law permitting appeals and writs of error from the Hawaii courts to this court. Briefly restating the argument, it is submitted that the land laws of Hawaii were not enacted by Congress, but were simply continued in force by Congress, with the reservation of an exclusive power of amendment or repeal (Sec. 73 of An Act to Provide a Government for the Territory of Hawaii, 31 Stat. at L., 141). This section, continuing in force the local land laws, distinctly states that they shall so continue only until Congress shall otherwise provide. When Congress acts in making new and further or different provisions, such provisions would be

considered as federal statutes. But the land laws of Hawaii were enacted and had the force of law prior to the action of Congress. The mere reservation on the part of Congress, of the exclusive power to amend and repeal those laws is not sufficient to make them laws of the United States. The usual rule that all enactments to which a state gives the force of law are statutes of the state does not apply to these laws. By Section 6 of An Act to Provide a Government for the Territory of Hawaii (31 Stat. at L. 141), all laws of Hawaii not inconsistent with the Constitution and laws of the United States were continued in force. Such laws were subject to repeal or amendment either by the Congress of the United States or the legislature of the Territory of Hawaii. All the statutes of Hawaii, therefore, derived their force from the act of Congress during the time that intervened before the first legislature of Hawaii met, and the bulk of such statutes depended for validity upon this act of Congress until the session of the Legislature of 1905, at which session the Revised Laws of Hawaii were enacted, and all statutes in force prior to the passage of the Revised Laws were repealed. It is clear that such laws cannot be considered as federal statutes because of the power to repeal or amend them given to the Legislature of Hawaii, yet they were continued in force by Congress in the same way that the land laws were continued. The only difference, therefore, is found in the power to amend or repeal. To such laws certainly the usual rule above stated cannot be said to apply.

For the sake of convenience the land laws were included in the compilation known as the Revised Laws, but no changes were made in such laws, nor can it be claimed that this inclusion alters their status. But Congress can at any time give to the Hawaiian legislature the same power to repeal or amend these laws, as was given with regard to the other statute laws. Such an enabling act would be a Federal statute, but if the land laws

of Hawaii are Federal statutes, then this power could not legally be conferred.

Therefore, since all laws of Hawaii were given the force of law for a time by act of Congress, it is urged that the object and purpose of Section 73 in providing that the land laws of Hawaii should continue in force until Congress should otherwise provide was merely to prevent a change of such laws by the local legislature, and that this section did not, nor was it intended by Congress that it should be construed as making the land laws of Hawaii statutes of the United States.

Minn. Bank v. Iowa, 12 How. 1, at 5;
United States v. Church, 5 Utah 373, 15 Pac. 479.

If the contention be sound that the land laws of Hawaii are not federal statutes, then it is clear that the construction of such laws by the Territorial Supreme Court is conclusive upon this court.

Iroquois Transportation Co. v. DeLaney, etc., Co., 205 U. S. 354; 51 L. ed. 836;

Stone v. Southern Ill. & M. Bridge Co., 206 U. S. 267, 51 L. ed. 1057;

O'Connor v. Texas, 202 U. S. 501, 50 L. ed. 1120;

West v. La., 194 U. S. 258, 49 L. ed. 965;

Brown v. N. J., 175 U. S. 172, 44 L. ed. 119;

Wilson v. Standefer, 184 U. S. 399 at 412, 46 L. ed. 618;

Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 1023;

Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487;

San Francisco v. Scott, 111 U. S. 768, 28 L. ed. 593;

Cal. Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206;

Sioux City R. R. Co. v. Trust Co., 173 U. S. 99, 107, 43 L. ed. 628;

Supreme Lodge K. of P. v. Meyer, 198 U. S. 508, 49 L. ed. 1146.

It therefore follows that the decision of the Supreme Court of Hawaii was on a construction of local laws and that even though in the opinion of this court the construction which has been given to Section 276 of the Revised Laws of Hawaii by the Hawaiian Supreme Court is incorrect, still this court cannot reverse the decision of the local court upon this writ of error.

D. But if the land laws of Hawaii are to be considered as Federal statutes still there is no ground for reversal.

This court will not consider and pass upon all cases wherein a statute of the United States is discussed and construed by state or territorial courts. Only when the validity of some federal statute or authority claimed under the United States is drawn in question does this court have jurisdiction. As has been pointed out above, in this case the validity of the authority claimed by defendant in error Pratt was not denied, but on the contrary was sustained by the Hawaiian Supreme Court. This authority depends upon a construction of Section 276, Revised Laws of Hawaii, and of Section 73 of the Act to Provide a Government for the Territory of Hawaii approved April 30, 1900, (31 Stat. at Large, 141). As the record shows, the validity of these statutes was not questioned, nor was the validity of the authority of the Commissioner of Public Lands to make exchanges attacked. Plaintiff challenged by his bill the manner of the exercise of this authority only, thereby admitting its existence, and limiting the issue to the question of how far this power extended. The local Supreme Court certainly

has power to construe Federal statutes locally applicable, such as the act creating the Territory. Therefore if the land laws are to be considered as Federal statutes, then the result is that this court lacks jurisdiction.

Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 226; 32 L. ed. 908, 914;

Linford v. Ellison, 155 U. S. 503, 508; 39 L. ed. 239;

Lynch v. United States, 137 U. S. 280, 285; 34 L. ed. 700;

United States v. Seamore, 153 U. S. 353; 38 L. ed. 742.

II.

THERE WAS NO ERROR IN REFUSING THE INJUNCTION SOUGHT, BECAUSE PLAINTIFF IN ERROR HAS NO INTEREST AT STAKE IN THIS CONTROVERSY.

Plaintiff in error assigns as one of the errors committed by the Territorial Supreme Court, its refusal to issue the injunction, claiming that it makes no difference whether he had any pecuniary interest at stake in the controversy or not. (Assignment 3, Tr. p. 41.) The Supreme Court of Hawaii did not pass upon this question. The only mention of it made in the record is contained in the opinion of Justice Hartwell, (Tr. p. 24), where he says:

> "Perhaps a citizen and tax payer's right to obtain injunctions to restrain official acts affecting public property ought not to be based upon the pecuniary loss, howsoever trivial or conjectural, but on the broad ground that any citizen may obtain a judicial inquiry into the validity of such acts and an injunction against them if found to be unauthorized. In the view we

take of the fourth question raised by the demurrer it is unnecessary to decide the question of the plaintiff's right to sue in this case."

Justice Hartwell thereupon went on to consider the question of the power to make the exchange and reached the conclusion that such power existed. Obviously, it would be unnecessary to consider plaintiff's right to sue unless it were concluded that the officers proposing to make the exchange were acting entirely without authority of law, and it is clear that this question was of no importance since it was held that such power existed. By the language used in the quotation above made we do not understand that the learned Justice intended to convey the idea that any citizen may from idle curiosity or a mere desire for a judicial opinion make a moot court of the highest tribunal in the Territory. This opinion is understood to mean that perhaps a citizen and tax payer's right to obtain injunctions to restrain acts affecting public property need not stand upon a pecuniary injury only, but that where such citizen and tax payer is likely to be otherwise injured, his rights should be equally safeguarded. Some right, however, either of his person or property must, it is submitted be encroached upon or threatened to give him a standing in court.

It was certainly not error for the Territorial Supreme Court to express no opinion upon the question of plaintiff's right to bring this suit.

However, it is now submitted that for several reasons, plaintiff had no standing in court and therefore that there was no error upon the part of the court in refusing him the relief sought.

A. The proposed exchange was of certain public lands for other lands of equal value and greater immediate service.

Not only did plaintiff fail to allege or claim that any injury or loss would occur to him or to the public at large by reason of the proposed exchange in the bill filed (Tr. pp. 4 to 7), but on the contrary, it appears affirmatively from that bill that he, as well as other tax-payers, would gain rather than lose by the consummation of the proposed exchange. (Tr. pp. 6 and 24.)

In this case plaintiff in error has shown in his bill of complaint filed that the exchange proposed was of certain public lands for other lands equal in value and of greater immediate service to the Territory. No allegation is made in the complaint that the proposal of the executive officers would not be fairly and completely carried out. Simply because the public lands involved in the exchange were under lease, it cannot be assumed that a loss of revenue will result to the Territory. The income value of the leases would necessarily be an element in the total value of the lands, and since the exchange was to be for lands "of equal value and greater immediate service," it will be presumed that this element was considered in fixing the total value, particularly in view of the allegations of this bill, which, instead of showing that the exchange will be to the loss of the Territory, admit the equality of the transfer. No allegation was made that the assets of the Territory would in any way be diminished by the proposed exchange, and no allegation was made that plaintiff in error would in any way be injured personally or as a tax payer by reason of the completion of the exchange. As the record stands, therefore, it would appear from the statements of plaintiff in error himself that he would gain rather than lose by the proposed exchange. The

only reason therefore for his invoking the aid of a court of equity is that he does not agree with the executive officers of the Territory in their policy with regard to these particular lands. It certainly is against public policy to permit any individual tax payer who may happen to disagree with the proposed action of certain executive officers charged under the law with the performance of public duties to come into court and seek by injunction to prevent the performance of the proposed acts.

B. The aid of the courts is extended only to those who are suffering injury or who reasonably fear injury to their property rights.

While it is a general rule throughout the United States that a tax payer may have his remedy by injunction against unauthorized acts of public officers or the waste and misuse of public moneys by them, yet it is submitted that this rule does not permit plaintiff in error here to maintain this proceeding. It has been shown that so far as injury is concerned, plaintiff in error would gain rather than lose by the proposed exchange; and further, that no claim is made by him of any injury whatsoever, either to himself or to the public at large. The reason for the rule permitting tax payers to maintain injunction proceedings in the cases above specified, is that the statutes under which the officers propose to act are enacted for the express benefit of the property holders or tax payers bringing suit, and that therefore any violation of such statutes, by such officers, is an injury to the property rights of complainants. In other words, such suits are sustained only when it appears that injury will be done to the complainant, either as an individual or as a member of the community. There must appear to be some resulting injury before the courts will grant relief. Since,

therefore, it appears from the bill that no injury will result to plaintiff, the rule does not permit him to maintain this suit.

The section under which the action sought to be prevented by this proceeding was authorized is drawn, as has been pointed out, with two distinct objets in view; first, to provide a method of selling public lands; and second, to provide a method for exchanging lands for others which in the opinion of the executive officers were better suited either for leasing or selling. Both powers, as has been shown, are discretionary. Assuming that plaintiff can properly claim that this section was enacted for his benefit as a citizen of Hawaii, although this is not clearly apparent, still in the entire absence of any showing of injury he has failed to bring himself within the rule stated above. So far as he is concerned, in the absence of any allegation that the officers proposed to exchange lands of great value for lands of less value, and of any other allegation from which some injury or loss should be inferred, the question of the proper exercise of authority is a moot question. His property rights are not in any way affected, nor are the rights of other citizens violated or injured by a transaction which will admittedly give to the Territory lands equal in value and more immediately serviceable. It is therefore submitted that he should not be permitted to maintain a proceeding of this character simply because he happens to disagree with the policy of the proposed exchange.

Equity will restrain violations of law only when accompanied by violations of property rights, and the courts take cognizance of suits only when it is apparent that the complaining party is suffering wrong or is likely to suffer wrong.

Smith v. Indiana, 191 U. S. 138, 48 L. ed. 125;
Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 396;
Cooley Const. Lim., 7th Ed., 232;
Charles v. City of Marion, 98 Fed. 166;
Allison v. Corson, 88 Fed. 581;

Indianapolis Gas. Co. v. Indianapolis, 82 Fed. 245;
Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341;
McCord v. Pike, 121 Ill. 288, 2 Am. St. Dec. 85 and note p. 97;
Brown v. Ohio Val. Ry. Co., 79 Fed. 176;
B. & M. R. R. v. Sullivan, 177 Mass. 230, 83 Am. St. Rep. 275;
State ex rel Craumer v. Thorson, 9 S. D. 149, 33 L. R. A. 582.

The cases in Hawaii holding that a tax payer may enjoin acts of executive officers are not in conflict with the rule, but on the contrary recognize and are based upon it, for in each case it is apparent that injury would have resulted to plaintiff if the acts complained of were found to be illegal.

Castle v. Kapena, 5 Haw. 27;
Lucas v. A. H. E. & C. Co., 16 Haw. 80;
Castle v. Atkinson, 16 Haw. 769.

And in the decisions of this court, upon which the Hawaiian decisions were based, it is apparent that the right of a complainant to maintain such a suit is dependent upon the fact that some injury will be done property rights.

Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070;
U. P. R. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428.

III.

THERE WAS NO ERROR IN NOT DECREEING THAT THE EXCHANGE OF LANDS BE CANCELLED AND IN NOT ORDERING THE RECONVEYANCE OF SAID LANDS SO EXCHANGED.

Nowhere in the transcript of record now before this court, except in the decision of the court on the motion for a formal

decree, (Tr. pp. 36 to 37), is any reference made to the fact that the exchange sought to be enjoined had been perfected after the rendition of the decision of the Supreme Court of Hawaii and before the entry of a formal decree. From that decision it appears that plaintiff moved for the entry of a formal decree continuing the injunction in force, pending an appeal to this court, and that the then attorney general stated orally to the court upon the hearing of this motion that the exchange had been perfected. It is difficult to see on what theory plaintiff in error now assigns as error on the part of the Territorial Supreme Court its failure to decree a cancelation of the exchange and its failure to decree a reconveyance of the lands so exchanged. So far as the record shows, plaintiff in error certainly did not ask that such be done. Assuming for the purposes of argument that the court could have done so upon its own motion, it is certainly clear that its failure to do so cannot be considered as error, for if the court could so act upon its own motion, then the power would be discretionary and the court's exercise of its own discretion cannot be reviewed upon appellate proceedings.

Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90;

Fourth Nat'l. Bank v. Albaugh, 188 U. S. 734, 47 L. ed. 673;

Kergan v. Gilmer, 131 U. S. 22, 33 L. ed. 110;

Indiana S. R. R. Co. v. L. L. & G. Ins. Co., 109 U. S. 168, 27 L. ed. 895;

Wills v. Russell, 100 U. S. 621, 25 L. ed. 607.

Plaintiff's failure to ask the territorial court for this relief should certainly prevent him from now asking that the action of the lower court be reversed upon this ground.

But assuming that this court will now consider as a proper assignment of error matter which appears only as a recital in

the assignment of errors filed, it is urged that no error can be found. A decree canceling the exchange and ordering a mutual reconveyance would have been entirely beyond the relief asked in this proceeding. Assuming that the court could in a proper case make such an order, still in this case it appears clear that it could not have ordered a reconveyance of the lands exchanged for the reason that only one of the parties to the transaction was before the court, and no request of any sort was made to bring into court the other party. While defendant in error Pratt was amenable to the orders of the court, yet he certainly could not be required to perform an impossibility. After the completion of the exchange and delivery by him, representing the Territory, of the patents and deeds conveying to the other party the lands of Lanai, he certainly could not by his own act regain for the Territory the legal title or possession of such lands. It would have been futile for the court to have ordered Pratt to reconvey to the other party to the exchange the lands received by the Territory. Such was not the purpose of the suit, nor in that way could the original status have been restored.

But in any event, as pointed out in the brief filed for defendant in error Pratt upon his motion to dismiss, the action taken by him following the advice of the then attorney general was fully justified in view of the wording of the decision of the Territorial Supreme Court and the practice which has prevailed in Hawaii. The closing words of the prevailing opinion of the Territorial Supreme Court, written by Mr. Justice Hartwell, are as follows:

> "The decree appealed from is reversed, the demurrer is sustained and bill dismissed."

No language could be more definite and certain than this. No decree, however formal, could speak in more certain terms or import finality to a greater extent. This concluding sentence of the prevailing opinion of the court left nothing unset-

tled. The decree appealed from was reversed, the demurrer was sustained and the bill was dismissed. Therefore the restraining order based upon the bill became of no force. Defendants in error were accordingly free to act as in their discretion seemed wise. It was not incumbent upon them to delay action in order to afford to plaintiff an opportunity to perfect an appeal to this court. If they were under any obligation to so delay their action for one day, then they would be under as great an obligation not to act for the full time within which an appeal could have been perfected.

It has not been customary in Hawaii to prepare and have entered a formal decree or judgment following a decision of the Supreme Court. The opinion handed down has been considered, as a rule, as if it were a formal judgment or decree. This practice being well known to the officers concerned as well as to the other party to the exchange, they were certainly justified in treating the clear, definite and decisive language of the court as sufficient authority to warrant the completion of the exchange.

It is therefore urged that the completion of the exchange immediately after the rendition of the decision, and prior to the entry of a formal decree cannot fairly be considered contemptuous, as may be contended.

If it had been the desire of plaintiff in error to continue in force the injunction pending appellate proceedings,, an order should have been asked from the court to that effect. A motion made sometime later and after the act had been done should not be considered as sufficient to make the former act a violation of the injunction.

It is obvious that the Territorial court saw considerable difficulty in the way of its ordering or attempting to order the setting aside of the transaction, and in view of the facts as shown it is submitted that the failure to order a cancelation and reconveyance is not error.

All through the Hawaiian reports will be found opinions

which conclude with language so decisive in character as to make such opinions in legal effect final decrees or judgments. Among the many cases found, attention is called to the following:

Roy et al. v. Scott, 17 Haw. 600;
In re Tom Pong, 17 Haw. 566, 575;
Rodrigues v. Teixeira, 17 Haw. 489, 492;
Kahula v. Kanewanui, 17 Haw. 466, 481;
In re Ass't. of Taxes, Gay & Robinson, 17 Haw. 227, 230;
Kaucalii v. Hardy, 17 Haw. 1, 19;
Forrester v. Hurtt, 18 Haw. 215, 219;
Troy Laundry Co. v. San. Steam Laundry Co., 18 Haw. 388, 391;
In re Ching Tai, 18 Haw. 501;
Peabody v. Damon, 16 Haw. 447, 456;
Desky v. Booth, 16 Haw. 507;
Fowler & Co. v. Catton, 16 Haw. 535, 543;
Lum Ah Lee v. Ah Soon, 16 Haw. 163, 170.

In *Carter v. Gear*, 16 Haw. 289, 293, the Hawaiian Supreme Court recognizes its own opinions as the final act in a case.

This court will notice that the Chief Justice of the Hawaiian Supreme Court has in some cases treated the opinion rendered by such court as a final judgment and accordingly has allowed writs of error or appeals to be taken in such cases reciting the opinion as a judgment or decree. Attention is called to the following cases, the first of which is now pending before this court and is cited according to the number given it on the October, 1908, calendar:

Cotton Bros. v. Territory, No. 7;
Notley v. Brown, 208 U. S. 429.

Although in the case at bar a formal decree was entered yet it added nothing to the decision which had already been ren-

dered. This court therefore, in view of the practice in Hawaii, shown by the decisions to which attention is called and the action of the Chief Justice of the Supreme Court in the case now pending here, should consider that defendant in error was fully justified in perfecting the exchange. A judgment or decree which the Supreme Court of the state holds to be final can hardly be considered in any other light by this court.

Wheeling & Baltimore Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287; 34 L. ed. 967;

Board of Commissioners, etc., v. Lucas, 93 U. S. 108, 23 L. ed. 822.

IV.

THERE WAS NO ERROR IN THE REFUSAL TO CONTINUE THE INJUNCTION IN FORCE PENDING APPELLATE PROCEEDINGS.

As has been shown above, the closing sentence of the prevailing opinion of the Territorial Supreme Court was couched in language which imported finality and left nothing undetermined. The entry of the final decree one month later added nothing to the decision already made. This decree was entered in pursuance of a motion for its entry which also asked that the injunction be continued in force pending appellate proceedings. The motion itself is not shown in the record, but is referred to in the opinion of the court. (Tr. p. 36.) As has been pointed out, since the language used by the court in rendering its decision was determinative of all questions in the cause, defendants in error were justified in completing the exchange. At the time of such completion no restraining order was in force. Therefore, since the act had been done, there was no advantage to any one in the entry of a formal order continuing the injunction in force, and since the injunction had once come

to an end, it could not be revived. The court could have made a new restraining order which would have operated to prevent the exchange if it had not already been made pending appellate proceedings. This would have been futile, however, inasmuch as the act complained of had already been performed. As the matter stood, therefore, the Court could not grant the request of plaintiff in error that the injunction be continued. In order to do so, it would have been necessary first for it to have set aside the entire transaction, and this, as has been pointed out above, was not requested by plaintiff in error, nor was it ordered by the court upon its own motion, assuming that such an order could have been made.

In any event, the continuance of the injunction pending the appeal was a matter resting in the sound discretion of the court. Its refusal, therefore, to exercise its discretionary power in the manner desired by plaintiff in error, cannot be considered as error.

See cases supra.

The court in its decision upon the motion asking for a continuance of the injunction (Tr. pp. 36 and 37), evidently recognized the difficulty of the situation, and it may fairly be said recognized also that defendants in error were justified in treating its opinion rendered in the main case as decisive and of such a character as to make the entry of a formal decree unnecessary particularly in view of the practice in Hawaii. It is therefore submitted that in this refusal to include in a formal decree, which added nothing to the finality of the former opinion, a futile declaration that a certain restraining order was continued in force, when the act which it was intended to restrain had already been done, is not error.

It is therefore submitted that there is no error to be found in the decree of the Hawaiian Supreme Court, and therefore, that this writ should be dismissed, and the decree affirmed.

Honolulu, Hawaii, September 10, 1908.

C. R. Hemenway,
Attorney General of Hawaii.

Henry E. Cooper,
Of Counsel.

Quære and not decided, whether any citizen and taxpayer has a right to maintain a suit in the courts of Hawaii to enjoin the land commissioner from acts involving unauthorized use of public lands, or whether if that right exists a personal loss to complainant must appear.

Quære and not decided, whether the land laws of Hawaii are Federal statutes within the meaning, and by virtue of § 83 of the organic act of April 30, 1900, 31 Stat. 141, c. 339, so that their construction involves a Federal question.

Writ of error to review 18 Hawaii, 221, dismissed.

THE facts are stated in the opinion.

Mr. Aldis B. Browne, with whom *Mr. A. G. M. Robertson* and *Mr. Alexander Britton* were on the brief, for plaintiff in error:

Under the practice of this jurisdiction it is not necessary for a complainant who is moving purely in the interests of the public to prevent misfeasance in office, or to protect public property from loss through the mistake, incompetence, or worse, of public officers, to show special injury.

Section 1549, Rev. Laws of Hawaii, requires the Attorney General as part of his duty to appear for and represent the officers of the Government in proceedings in court without charge. It is not the practice to bring cases of this character in the name of the Territory upon the information of an individual *ex relatione*. *Castle* v. *Kapena*, 5 Hawaii, 27; *Lucas* v. *Amer.-Haw. E. & C. Co.*, 16 Hawaii, 80; *Castle* v. *Atkinson*, 16 Hawaii, 769, and see also *U. P. Railroad Co.* v. *Hall*, 91 U. S. 343; *Crampton* v. *Zabriskie*, 101 U. S. 601.

It should make no difference as to this point that the exchange contemplated by the governor and the Commissioner of Public Lands was to be for lands of equal value. The right of a taxpayer to an injunction to prevent the illegal expenditure of public money is not maintained on the ground that the public was not to receive a *quid pro quo*, but on the lack of legal authority to make it. See *Winn* v. *Shaw*, 87 California, 631; *Nelson* v. *Commissioners*, 6 Colo. App. 279; *Stratford* v. *Greens-*

boro, 124 N. C. 127; *Times Pub. Co.* v. *Everett*, 9 Washington, 518; *Stevens* v. *St. Mary's School*, 144 Illinois, 336; *State* v. *Commissioners*, 22 Nevada, 87.

Mr. Charles R. Hemenway and *Mr. Henry E. Cooper*, with whom *Mr. William L. Whitney* and *Mr. Charles F. Clemons* were on the brief, for defendants in error:

Plaintiff in error has no standing in court because it appears that he has no interest whatever at stake. A court will only take cognizance of suits at law or proceedings in equity when some injury has been, or appears to have been, done, or is or appears to be threatening the complaining party. The aid of the court will not be extended to one who is suffering no wrong and is not fearing a threatened injury.

While a taxpayer in Hawaii may have his remedy by injunction against official acts which involve the misuse or waste of public funds, the case at bar is not within this rule. *Crampton* v. *Zabriskie*, 101 U. S. 601, 609; *Castle* v. *Kapena*, 5 Hawaii, 27; *Lucas* v. *Amer.-Haw. E. & C. Co.*, 16 Hawaii, 80; *Castle* v. *Atkinson*, 16 Hawaii, 769.

It must appear affirmatively from the pleadings that injury, and substantial injury, will be sustained by plaintiff from the acts complained of, before such acts will be enjoined. *Smith* v. *Indiana*, 191 U. S. 138, 146; *Caffrey* v. *Oklahoma*, 177 U. S. 346, 348; *Clark* v. *Kansas City*, 176 U. S. 114, 118; *Red River Valley Bank* v. *Craig*, 181 U. S. 548, 558; *Supervisors* v. *Stanley*, 105 U. S. 305, 314; *Ludeling* v. *Chaffe*, 143 U. S. 301, 304; *Giles* v. *Little*, 134 U. S. 645, 650; *Ewings* v. *Norwood*, 5 Cranch, 344, 348; *Montgomery* v. *Hernandez*, 12 Wheat. 129, 132; *Henderson* v. *Tennessee*, 10 How. 311, 322; *Hale* v. *Gaines*, 22 How. 144, 160; *Long* v. *Converse*, 91 U. S. 105.

In this case there is no allegation or claim of injury made in the bill upon which the prayer for an injunction is based, and the bill shows that plaintiff, as a taxpayer, will gain rather than lose by the exchange. The facts as they appear from the record are that an exchange of certain public lands was pro-

posed, not only for lands "equal in value" but also "of greater immediate service" to the Territory. As stated in the prevailing opinion below, the bill does not show whether the loss of revenue from rent would be offset by rents from land of equivalent value or by a saving of revenue which otherwise would be used. In the absence of an averment of loss none can be inferred. The taxpayer would gain from the transaction pecuniarily if the Territory should thereby obtain property for such public uses as schoolhouses, for instance, for which otherwise legislative appropriations would be made requiring increased taxation and in such cases the plaintiff's only interest would be his desire that the public land laws be correctly administered.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The plaintiff in error, who was plaintiff in the court below, and whom therefore we shall refer to as plaintiff, brought this suit in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at chambers, to enjoin George R. Carter, Governor of the Territory, and the defendant, Commissioner of Public Lands of the Territory, from exchanging certain lands of the Territory for other lands.

The governor promulgated, on the twenty-ninth of November, 1906, the following order:

"Lanai Lands—Notice is hereby given that having decided an exchange of the public lands of the island of Lanai to be advisable, the commissioner of public lands is prepared to receive offers of other lands that are equal in value to those of Lanai, and of greater immediate service to the Territorial government, from any responsible person, up to and including Saturday, the fifteenth day of December, 1906."

The island of Lanai contains a total area of 86,400 acres, of which the Territory owns 47,679 acres. The lands owned by the Territory are divided into five tracts, and are under lease to one Charles Gay for annual rentals which amount in all to

the sum of $1,600. These facts are alleged in the bill, and that the tracts are of great value—one containing 8,000 acres of land, which is good grazing land, and has three miles of sea frontage, and extends inland six miles, being worth $40,000. Another tract, it is alleged, is of the same kind of land, and has a sea frontage of five and one-half miles and an inland depth of six miles, and is worth $37,000. The other tracts are of the value of $5,000.

It is alleged that Pratt, as commissioner, threatens to and will exchange such lands for other lands if he receives an offer therefor from a responsible person, and that the governor will consent and approve the exchange unless he and Pratt be enjoined. It is further alleged that Pratt has no legal right to make the exchange nor the governor to approve it.

It is further alleged that the intended and proposed exchange of lands "is not proposed by way of compromise or equitable settlement of the rights of any claimants, nor by way of exchange for parcels of lands acquired for any road or roads, nor for a site or sites of a government building or buildings, nor for any other governmental purpose or purposes."

An injunction was prayed against the exchange and against issuing land patents for the lands received in exchange. A temporary injunction was granted, which, upon the motion of the governor, was dissolved, and the bill dismissed as to him. Pratt demurred to the bill and urged as grounds thereof that the bill was insufficient, that it did not appear that he, as commissioner, was doing or about to do any act in violation of law, that plaintiff had no legal capacity to sue, that no injury was threatened or otherwise to plaintiff, that he was not sufficiently interested to be entitled to an injunction or to any relief in a court of equity, that the complaint was not properly verified and that the allegation that the defendant, as commissioner, had no legal authority to exchange public lands, was a conclusion of law.

The demurrer was overruled, the court holding that the plaintiff had the right to bring and maintain the suit, and that

the proposed exchange of lands was "unlawful, illegal and unwarranted." Ten days were given to further plead, and in default of which the injunction was to be made permanent. The decree was reversed by the Supreme Court of the Territory. 18 Hawaii, 221. This writ of error was then sued out and George R. Carter, governor, named therein as a defendant, but the writ was subsequently dismissed, as to him, on motion of his successor, the present governor.

The Supreme Court of Hawaii assumed, without definitely deciding, that the plaintiff had a right to maintain the suit. The question of the validity of the exchange it decided against the contention of the plaintiff, holding that the commissioner had the power to make the exchange. Of the right of plaintiff to sue, the court said that it had been adjudicated in that court that a citizen and taxpayer had a right to obtain an injunction against official acts involving unauthorized use of public funds. To sustain this view the court cited *Castle* v. *Minister of Finance*, 5 Hawaii, 27; *Lucas* v. *Amer.-Haw. E. & C. Co.*, 16 Hawaii, 80; *Castle* v. *Secretary of the Territory*, 16 Hawaii, 769. It is an implication, from the comment of the court, that the ground of those decisions was the pecuniary loss that would come to the taxpayer from the action sought to be restrained. But the court, however, went farther, and said that perhaps the right of the taxpayer to "restrain official acts affecting public property ought not to be based on the pecuniary loss, however trivial or conjectural, but on the broad ground that any citizen may obtain a judicial inquiry into the validity of such acts, and an injunction against them if found to be unauthorized." The court remarked, however, that on account of the view it entertained of the validity of the acts of the officers, it would not decide the question of the right of the plaintiff to sue. On neither question are we called upon to pass, nor are we required to decide whether the land laws of the Territory are Federal statutes by virtue of § 83 of its organic act, which provides that its laws "relating to public lands shall continue in force until Congress shall otherwise

provide," and that therefore a Federal question is involved in the case. We have held that the jurisdiction of this court can only be invoked by a party having a personal interest in the litigation. *Smith* v. *Indiana*, 191 U. S. 138, 148.

The plaintiff has not such an interest. He sues as a property owner and taxpayer, and the relief he asks is an injunction against the Commissioner of Public Lands, to restrain him from exchanging the lands described in the bill for other lands. It is contended that such action is illegal, because that officer has no power to exchange lands under lease, nor has he power to exchange lands except in parcels of not over one thousand acres. The contention is based on the proviso of § 276 of the Revised Laws of Hawaii. We give the section in the margin,[1]

[1] SEC. 252. "The commissioner of public lands or superintendent of public works, as the case may be, by and with the authority of the governor, shall have power to lease, sell or otherwise dispose of the public lands, and other property, in such manner as he may deem best for the protection of agriculture, and the general welfare of the Territory, subject, however, to such restrictions as may, from time to time, be expressly provided by law."

SEC. 254. "The provisions of section 253 shall not extend or apply to cases where the government shall by quitclaim, or otherwise, dispose of its rights in any land, by way of compromise or equitable settlements of the rights of claimants, nor to cases of exchange, or sales of government lands in return for parcels of land acquired for roads, sites of government buildings, or other government purposes."

SEC. 276. "The commissioner may with the consent of the governor sell public lands not under lease, in parcels of not over one thousand acres, at public auction for cash. Upon any such sale and the payment of the full consideration therefor, a land patent shall be issued to the purchaser.

"And he may, with such consent, sell public lands not under lease in parcels of not over six hundred acres, at public auction upon part credit and part cash, and deliver possession under an agreement of sale containing conditions of residence on or improvement of the premises sold, or of payment by instalments or otherwise of the purchase price, or all or any of such conditions.

"And in case of default in the performance of such conditions, the commissioner may, with or without legal process and without notice,

and also §§ 252 and 253, which must be considered in connection with it. The argument to support the contention is that the proviso must be understood in the strict technicality of limiting or qualifying the preceding subject-matter, and to the carving out therefrom some special matter, and, it is insisted, giving the proviso that purpose the specially carved out matter "is the requirement of an auction sale in the case of the exchange of land," leaving as applicable to such exchange all the other limitations. The Supreme Court of the Territory, as we have seen, decided against the contention. Let us grant,

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demand or previous entry, take possession of the premises and thereby determine the estate created by such agreement. In case of such forfeiture, such land shall be sold at auction, either as a whole or in parcels, for cash or on terms of time payments in the discretion of the commissioner; and if such sale shall result in an advance on the original price, the original purchaser shall receive therefrom the amounts of his payments to the Government on account of purchase, without the interest, and a *pro rata* share in such advance in proportion to the amounts of his payments. If such sale shall result, however, in a less price than the original, the amount returnable to him shall be charged with a *pro rata* amount of such decrease proportioned to the amounts of his payments. The treasurer is hereby authorized to pay the amount returnable to the outgoing tenant, upon the requisition of the commissioner, out of any funds available for such purpose.

"Which agreement shall entitle the purchaser to a land patent of the premises upon the due performance of its conditions.

"The commissioner shall have authority to fix any upset price for all such sales for cash or part credit and part cash.

"All such sales shall be held in Honolulu, or in the district where the land to be sold is situated. Any person designated by the commissioner may act as auctioneer at such sales without taking out an auctioneer's license.

"Provided, however, that land patents may be issued in exchange for deeds of private lands or by way of compromise upon the recommendation of the commissioner and with the approval of the governor without an auction sale, and further provided, that the governor may in his discretion, upon such recommendation and approval, execute quitclaim deeds for perfecting the titles of private lands where such titles are purely equitable or where such lands are suffering under defective titles, or in cases of claims to use of lands upon legal or equitable grounds."

arguendo, that the decision may be disputed, what injury has plaintiff shown that he will suffer by the exchange? What injury, indeed, has he shown, either to the Territory or to any taxpayer of the Territory?

The plaintiff alleges that he is a taxpayer, but does not allege anything from which it can be inferred that he will be injured as a taxpayer, subject to a burden as such. It is true it is alleged that the lands which are offered for exchange are under lease for terms varying from twenty-five to thirty-five years, at a rental of sixteen hundred dollars. But it is also alleged that the purpose formed by the governor and commissioner, and the purpose advertised by them, was to get for the lands other lands of equal value and of greater immediate service to the territorial government. The suit was brought to restrain the execution of that purpose. Benefit, therefore, not injury, apparently may result from the exchange, and, so far as we are informed by the record, it may be even a benefit to the policy which plaintiff declares it is the purpose of the land laws of the Territory to promote, and upon which he, in part, bases his interpretation of them, the policy of encouraging "the settlement and homesteading of public lands," and the "parcelling out" of them "in limited areas on favorable terms." The plaintiff takes pains to justify this inference, for he avers that the exchange is not proposed for settlement of rights or claims, nor for the use of roads, nor for the site or sites of the government building or buildings, nor for any other government purpose. Therefore, as plaintiff has no personal interest in the matter in litigation, the writ of error is

Dismissed.

McCANDLESS *v.* PRATT, LAND COMMISSIONER OF HAWAII.[1]

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 109. Argued November 6, 9, 1908.—Decided December 21, 1908.

The jurisdiction of this court can only be invoked by a party having a personal interest in the litigation. *Smith* v. *Indiana*, 191 U. S. 138.

A writ of error will not lie to review a judgment of the Supreme Court of Hawaii, dismissing the bill in a suit brought by a taxpayer to enjoin the land commissioner from an alleged unauthorized use of public lands where it does not appear that complainant would be personally injured by the threatened use.

[1] Original docket title, McCandless *v.* Carter, Governor of Hawaii.